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TABLE OF TITLES AND DEFINITIONS.

See index for numerous sub-titles and definitions contained in the notes.

- Tidal Rivers, 1
 Tide, 1
 Tili, 2
 Tillage, 2
 Timber, 2
TIME (COMPUTATION OF), 3
 Timepiece, 14
TIME-TABLES, 14
 Tippling House, 18
 Title Insurance, 19
TITLE (REAL PROPERTY), 20
 To, 49
 Tobacco, 50
 Token, 50
 Tolerate, 50
 Toll, 51
 Ton, 51
 Tonnage and Tonnage Duties, 52
TONTINE INSURANCE, 52
 Took, 69
 Tools, 69
TORTS, 72
 Tort-feasor, 79
 Torture, 79
 Total Loss. See Fire Insurance;
 Loss; Marine Insurance; Navigation.
 Touch and Stay, 79
TOWAGE; TUGS AND TOWS, 80
 Towards, 97
 To-wit, 97
TOWNS AND TOWNSHIPS, 98
TOXICOLOGY. See Abortion; Drug-
 gist; Homicide; Medical Jurispru-
 dence; Poisons and Poisoning.
TRACKS. See Railroads; Street Rail-
 ways; Taxation; Taxation (Corpo-
 rate).
 Trade, 226
TRADE COMBINATIONS AND CORPORATE
TRUSTS, 229
TRADE FIXTURES. See Fixtures.
TRADE-MARKS, 239
TRADER. See Bankruptcy; Execu-
 tions; Indians; Insolvency; Living;
 Married Women; Merchant.
TRADE, RESTRAINT OF. See Illegal
 Contracts
TRADE UNIONS, 526
 Traffic, 528
TRAFFIC RATES. See Bill of Lading;
 Carriers of Goods; Carriers of Live-
 stock; Interstate Commerce; Mu-
 nicipal Corporations; Railroads;
 Ships and Shipping.
 Train, 528
TRAMP. See Homicide; Poor and
 Poor Laws; Vagrancy.
 Transaction, 529
TRANSCRIPT. See Appeal; Authenti-
 cation; Docket; Exemplification;
 Garnishment; Indictment; Judg-
 ments; Memorandum; New Trial;
 Record.
 Transfer, 529
 Transfer Companies, 529
 Transport; Transportation, 531
 Travail, 531
TRAVEL; TRAVELER; TRAVELING. See
 Commercial Traveler or Drummer;
 Concealed Weapons; Conveyance;
 Domicile; Guest; Highway; Inns
 and Innkeepers; Lodger; Sunday.
 Traveled Place, 531
 Traverse, 532
TREASON, 532
 Treasure Trove, 537
 Treasury, 539
TREATIES, 539
TREEBLE COSTS. See Costs.
TREES, 557
TRESPASS, 568
TRESPASS ON THE CASE, 694

TABLE OF TITLES AND DEFINITIONS.

TRIAL. See Adjournment; Bill of Exceptions; Change of Venue; Constitutional Law; Contempt; Criminal Procedure; District or Prosecuting Attorneys; Instructions; Interpreter; Judge; Jury and Jury Trial; Justice of the Peace; Master in Equity; New Trial; Oath; Production of Documents; Questions of Law and Fact; Referees; Stay of Proceedings; Sunday; Verdict; Witnesses.

TRIMMINGS, 710

TROOPS. See Militia.

Trouble, 710

TROVER, 711

TRUCK ACTS. See Store Order Acts.

TRUCK WAGON. See Cart.

True, 858

TRUE BILL. See Grand Juries; Indictment.

Trunk, 858

TRUST DEEDS AND POWER OF SALE MORTGAGES, 859.

TRUSTEE PROCESS. See Foreign Attachment; Garnishment.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

TIDAL RIVERS.¹—(See also **NAVIGABLE WATERS**, vol. 16, p. 236; **WATERS AND WATERCOURSES**.)

TIDE.—See note 2.

1. In order that a river may be tidal at a certain spot, it is not necessary that the water should be salt, but the spot must be one where the tide, in the ordinary and regular course of things, flows and reflows; and hence where, in case of exceptionally high tides, some portion of the river is dammed up and prevented from flowing down, and so rises and falls with the tide; the river cannot, on that account, be called tidal at that point. *Reece v. Miller*, 8 Q. B. Div. 630. But if the water rises and falls regularly with the ebb and flow of the tide, it is tide water, although the fluctuation is caused by the meeting of the sea water with the river water. *Atty. Gen'l v. Woods*, 108 Mass. 436; 11 Am. Rep. 380. And see, to the same effect, *Rex v. Smith*, 2 Dougl. 441; *Peyroux v. Howard*, 7 Pet. (U. S.) 324; *Lapish v. Bangor Bank*, 8 Me. 85. But the flowing and reflowing of the waters of a lake into a river, caused by the occasional swell and subsidence of the lake, and not by the ebb and flow of the regular tides, do not constitute such river a "tidal river." *Hooker v. Cummings*, 20 Johns. (N. Y.) 98; 11 Am. Dec. 249.

2. **Tidal Waters.**—(See also **BEACH**, vol. 2, p. 159; **BOUNDARIES**, vol. 2, p. 504; **NAVIGABLE WATERS**, vol. 16, p. 236; **SEAWEED**, vol. 21, p. 981; **SHORE**, vol. 22, p. 778.)

Tide waters, whether salt or fresh, are waters where the ebb and flow of the tide from the sea is felt. *Com. v. Vincent*, 108 Mass. 447. Where land lying along the seashore is conveyed by boundary to "tide water," the "sea" or "seashore," or any other similar expression, the law gives effect to it, and extends it to the low-water mark. *Doane v. Willcutt*, 5 Gray (Mass.) 336; 66 Am. Dec. 369.

Tide Lands.—Within the *California* statute providing for the sale of tide lands belonging to the state, the term "tide lands" means such lands as are covered and uncovered by the flow of ordinary tides. It does not include lands permanently submerged. *Walker v. Marks*, 2 Sawy. (U. S.) 152; *Rondell v. Fay*, 32 Cal. 354; *People v. Davidson*, 30 Cal. 379.

In *Elliott v. Stewart*, 15 Oregon 259, it was held that the act providing for the purchase from the state of "tide lands," did not authorize the acquisition of a private title to a sand bar several miles from the shore, only exposed at low tide and covered by six feet of water at high tide; that such a bar was not an "island," a "shore," or a "beach," within the definitions of those terms, and no purchaser thereof from the state, as "tide land," could acquire an exclusive right to fish on said bar.

TILL—(See also **TIME (COMPUTATION OF)**, vol. 26, p. 3; **UNTIL**).—See note 1.

TILLAGE.—Husbandry; the cultivation of land, particularly by the plow.²

TIMBER—(See **LOGS AND LUMBER**, vol. 13, p. 1018; **TREES**, vol. 26).—The term timber includes the body, stem, or trunk of a tree, or the larger pieces or sticks of wood which enter the framework of a building, excluding the planks, boards, shingles, or laths used to complete the structure.³

1. "Till" includes the day to which it is prefixed. *Bunce v. Reed*, 16 Barb. (N. Y.) 352; *Dakins v. Wagner*, 3 Dowl. P. C. 535.

"Till Next Term" does not include any part of said term. *DeHaven v. DeHaven*, 46 Ind. 296.

2. U. S. v. Williams, 18 Fed. Rep. 478. In this case, it was held that a settler on public land under the pre-emption and homestead acts, after clearing the same of timber for the purpose of "tillage" or actual cultivation, could dispose of the timber to the best advantage to himself, but the timber could not be cut for the purpose of disposing of it by sale or otherwise.

In *Vigar v. Dudman*, L. R., 7 C. P. 72, *aff'd* L. R., 6 C. P. 470, it was held that where a house was built upon a portion of an acre field, and the other portion, to the extent of twenty-two perches, converted into a garden by the owner, who fenced off the house and garden from the rest of the field, the remaining portion being used as an orchard, the manner in which the field had been dealt with did not amount to a conversion of it or any part of it, into "tillage."

Land sown to clover, with corn, is not thereby restored to a state of permanent pasture, but is still in tillage. *Birch v. Stephenson*, 3 Taunt. 469.

3. *Babka v. Eldred*, 47 Wis. 189; *Kollock v. Parcher*, 52 Wis. 393.

In *Battis v. Hamlin*, 22 Wis. 669, it seems to have been assumed that shingles are lumber and not timber. And see *Gross v. Eiden*, 53 Wis. 343. In *Babka v. Eldred*, 47 Wis. 189, laths were also held not to be timber but lumber.

In *Kollock v. Parcher*, 52 Wis. 393, railroad ties were held to be timber.

In *McCauley v. State*, 43 Tex. 374, it was held that an indictment for cutting, destroying, and carrying away

fence rails did not lie under *Texas* Penal Code, art. 717, punishing or imposing a penalty for knowingly cutting down or destroying any "timber" without the consent of the owner.

In *U. S. v. Stores*, 14 Fed. Rep. 825, it was said that the particular meaning of the term depends upon the connection in which the word is used, or the calling of the person making use of it, and where parties were indicted for cutting "timber" on government land in violation of the act of congress, the term was held to apply not alone to large trees fitted for house or ship building, but to include trees of any size of a character or sort that could be used in any kind of manufacture, or the construction of any article. In this case, it was also held that selling the timber for fire wood, or burning it into charcoal, would be no defense or excuse for cutting or removing it, nor could it be sufficient evidence of the worthlessness of the timber cut, to justify the act. But in *Nash v. Drisco*, 51 Me. 417, it was held that the purchaser, under a contract for the purchase of all the "timber" growing on a certain place, acquired no title to trees suitable only for fire wood.

In *U. S. v. Shuler*, 6 McLean (U. S.) 28, it was said: "Unless the contrary clearly appears from the context, it will be presumed that the word was employed in its ordinary popular sense. It is not the interpretation of an artistic or technical word, or a word of equivocal meaning. It is a word in common use, and has an enlarged or restricted sense, according to the connection in which it is employed. . . . As a generic term, it properly signifies only such trees as are used in building—either ships or dwellings. But its signification is not limited to trees; it applies to the wood, or the particular form which the tree assumes when no longer growing or standing in the

TIME (COMPUTATION OF).—See also MONTII, vol. 15, p. 712; REASONABLE TIME, vol. 19, p. 1089; SPECIFIC PERFORMANCE, vol. 22, p. 908.)

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| <p>I. Definition, 3. II. General Rule for Computation, 3. 1. <i>From Time of an Act Done</i>, 3. 3. 2. <i>From the Date, or from the Day After the Date</i>, 7.</p> | <p>III. Rule as to Fractions of a Day (See DAY, vol. 5, p. 89), 9. IV. Use of the Words "Until" and "Till," 9. V. Solar and Standard Time, 10. VI. Sunday in the Computation of Time, 10.</p> |
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I. DEFINITION.—Time is the system of those relations which any event has to any other, as past, present, or future.¹ It is, also, defined as the measure of duration.²

II. GENERAL RULE FOR COMPUTATION—1. *From Time of an Act Done.*—The old rule was that where computation was to be made from the time of an act done, the day on which the act was done should be included,³ unless a right would be divested, an estoppel created, or a forfeiture incurred, when the computation would

ground. Strictly speaking, a tree is that which is growing or standing in the ground, whether alive or dead. . . . When the trunk is severed from the root, and felled to the earth, it is no longer, properly speaking, a tree. It becomes timber or lumber, according to the use to which it can be applied.⁴

Cross-references.—Sale of—Within Statute of Frauds.—See LOGS AND LUMBER, vol. 13, p. 1020.

Timber Culture and Timber Lands.—See PUBLIC LANDS, vol. 19, pp. 310, 331 and 364. A statute giving a bounty for planting trees, to be paid by the county in which they are planted, is void, under *Missouri* Const., art. 4, § 47, and also because the giving of such bounties is an abuse of the power of taxation. *Deal v. Mississippi County*, 107 Mo. 464; 14 L. R. A. 622.

License to Cut.—See LOGS AND LUMBER, vol. 13, p. 1030.

Trespass for Cutting.—See TRESPASS.

Restraining Cutting.—See INJUNCTION, vol. 10, p. 883.

Replevin for Timber Cut.—See REPLEVIN, vol. 20, pp. 1061-1063.

Measure of Damages.—See DAMAGES, vol. 5, p. 36.

Waste in Cutting.—See WASTE.

1. Century Dict.
 2. Black's Law Dict.; Bouvier's Law Dict.

3. *Arnold v. U. S.*, 9 Cranch (U. S.) 104; *Priest v. Tarlton*, 3 N. H. 93; *Wheeler v. Bent*, 4 Pick. (Mass.) 167; *Adams v. Cumiskey*, 4 Cush. (Mass.)

420; *Butler v. Fessenden*, 12 Cush. (Mass.) 78; *Blake v. Crowinshield*, 9 N. H. 304; *Wayne v. Duffy*, 1 Phila. (Pa.) 367; *Snyder v. Warren*, 2 Cow. (N. Y.) 518; 15 Am. Dec. 519; *Griffith v. Bogert*, 18 How. (U. S.) 158; *Moorar v. Covington City Nat. Bank*, 80 Ky. 305; *Jacobs v. Graham*, 1 Blackf. (Ind.) 392; *Northrop v. Cooper*, 23 Kan. 432; *English v. Ozburn*, 59 Ga. 392; *Brown v. Buzan*, 24 Ind. 194.

In *Chiles v. Smith*, 13 B. Mon. (Ky.) 461, *Simpson, J.*, citing *Bellaris v. Hester*, 1 Ld. Raym. 280, said: "The rule in regard to the computation of time seems to be, that when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done." (*Overruling Smith v. Cassity*, 9 B. Mon. (Ky.) 192; 48 Am. Dec. 420.) See also *Perry v. Provident L. Ins. Co.*, 99 Mass. 162; *Handley v. Cunningham*, 12 Bush (Ky.) 401; *Hampton v. Erenzeller*, 2 P. A. Browne (Pa.) 18; *Batman v. Megowan*, 1 Metc. (Ky.) 533; *White v. Crutcher*, 1 Bush (Ky.) 472; *Wood v. Com.*, 11 Bush (Ky.) 220; *Glassington v. Rawlins*, 3 East 407; *Rex v. Adderley*, 2 Dougl. 463; *Lebus v. Wayne-Ratterman Co.* (Ky. 1893), 21 S. W. Rep. 652; *Thrower v. Brandon*, 89 Ala. 406.

In *Pearpoint v. Graham*, 4 Wash. (U. S.) 232, *Washington, J.*, said: "Where the computation of time is to

be made exclusive of such day.¹ But the general tendency of the modern authorities, where an act is required to be done within

be made from an act done, the day on which the act is performed is included, because the act is the *terminus a quo* the computation is to be made; and there being in contemplation of law no fraction of a day, unless when an inquiry as to priority of acts done in the same day becomes necessary, the *terminus* is considered as commencing on the first moment of that day;” citing *Clayton’s Case*, L. R., 5 Ch. 15; *Castle v. Burditt*, 3 T. R. 623; *Norris v. The Hundred of Gaustin*, 2 Roll. Ab. 520.

In *Thomas v. Afflick*, 16 Pa. St. 14, it was held that the rule of common law as to the computation of time is to include the first day and exclude the last, and, therefore, where notice to a justice of the peace of an intended suit, given in pursuance of *Pennsylvania* Act of March 21, 1772, § 1, was served on May 19, and suit brought on June 18, the notice was given thirty days before the suit. The rule laid down in *Goswiler’s Estate*, 3 Pen. & W. (Pa.) 200, was disapproved in the above case; but the court, in *Cromelin v. Brink*, 29 Pa. St. 522, said that *Goswiler’s Case* was overthrown without an attempt at either reason or authority, and, *overruling* *Thomas v. Afflick*, 16 Pa. St. 14, adhered to the modern doctrine.

Under the *Delaware* statute for discharging debtors after five days imprisonment, the first and last days are to be included. *Fortner’s Case*, 2 Harr. (Del.) 461.

In computing the time for the limitation of actions against a person from the day of his coming of age, the day he attained his majority is to be counted; in computing his majority, the day of his birth is to be included. *Ross v. Morrow*, 85 Tex. 172. See also *Phelan v. Douglass*, 11 How. Pr. (N. Y. Supreme Ct.) 193.

Under the *Connecticut* Gen. Sts., p. 83, § 2, requiring notice to be given of town meetings, by a warning sign set on a post at least five days, inclusive, before the meeting, it was held that the term “five days, inclusive,” means five days inclusive of the day on which the notice is posted, but exclusive of the day on which the meeting is to be held. *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22.

Where a lease was made for one year from the first day of April, the term

was held to expire at the close of the 31st day of March next. But in this case the decision is put expressly on the understanding of the country respecting the end of a tenant’s term. *Marys v. Anderson*, 24 Pa. St. 272.

In computing the time between the *teste* of an execution and the return, the day of the *teste* is to be included and the day of the return excluded. *Ogden v. Redman*, 3 A. K. Marsh. (Ky.) 234.

In applications for a new trial under the *Kentucky* Civ. Code, § 371, where the requirement is that the motion be made within three days after the decision, the day of the decision and the day of the motion must both be computed. *Long v. Hughes*, 1 Duv. (Ky.) 387.

The day on which an execution issues is included in the time which it has to run. *Ryman v. Clark*, 4 Blackf. (Ind.) 329.

In *Indiana*, the day fixed by a justice of the peace for the trial of the right of property in goods taken in execution, must be within five days after the claim to the goods is filed. In reckoning the time, the day on which the claim was filed must be counted. *Long v. McClure*, 5 Blackf. (Ind.) 319.

When a statute requires service for a fixed number of days, the mode of computation is to include the day of service and to exclude the other. But when it requires a number of entire days, both must be excluded. *Garner v. Johnson*, 22 Ala. 494.

1. In the computation of time, whether the day on which an act is done or an event happened, is to be included or excluded, must depend upon the circumstances and the reason of the thing, so that the intention of the parties may be effected. Such a construction should be given as would operate most to the ease of the parties entitled to favor, and by which rights would be secured and forfeitures avoided. *O’Connor v. Towns*, 1 Tex. 107. See also *Dowling v. Foxall*, 1 B. & B. 193; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Lester v. Garland*, 15 Ves. 248; *Blaymire v. Hayley*, 6 M. & W. 49; *Taylor v. Brown*, 147 U. S. 640.

In the computation of time from an act done, the day on which the act is done will be excluded, whenever such

a limited period, from or after a particular time or event, is to exclude the day thus designated, and include the last day of the specified period.¹

exclusion will prevent an estoppel or save a forfeiture. *Windsor v. China*, 4 Me. 298; *Flint v. Sawyer*, 30 Me. 226; *Moore v. Bond*, 18 Me. 142; *State v. Gasconade County Ct.*, 33 Mo. 102; *State v. Schnierle*, 5 Rich. (S. Car.) 299; *Williamson v. Farrow*, 1 Bailey, (S. Car.) 611; 21 Am. Dec. 492; *McElwee v. White*, 2 Rich. (S. Car.) 95.

In cases of forfeiture, the day of the event, after which in a specified number of days the forfeiture occurs, will be excluded. And in applying this doctrine to a *quasi* forfeiture, a court of equity should lean against the construction which favors forfeiture. *Thorne v. Mosher*, 20 N. J. Eq. 257.

In *Blake v. Crowninshield*, 9 N. H. 304, Wilcox, J., said: "The tendency of the more recent decisions, undoubtedly, is to exclude the day of the act, unless to save a forfeiture, or for some other special reason, it becomes necessary to reckon it inclusive."

1. *Dutcher v. Wright*, 94 U. S. 553; *Farwell v. Rogers*, 4 Cush. (Mass.) 460; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Buttrick v. Holden*, 8 Cush. (Mass.) 233; *Fuller v. Russell*, 6 Gray (Mass.) 128; *Seekonk v. Rehoboth*, 8 Cush. (Mass.) 371; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Dec. 470; *Swift v. Tousey*, 5 Ind. 196; *Krohn v. Templelin*, 2 Ind. 146; *Hathaway v. Hathaway*, 2 Ind. 513; *Woinack v. McAhren*, 9 Ind. 6; *Faure v. U. S. Exp. Co.*, 23 Ind. 48; *Vogel v. State*, 107 Ind. 374; *Hill v. Pressley*, 96 Ind. 447; *Catterlin v. Frankfort*, 87 Ind. 45; *Reigelsberger v. Stapp*, 91 Ind. 311; *Kerr v. Haverstick*, 94 Ind. 178; *Cornell v. Moulton*, 3 Den. (N. Y.) 12; *Homan v. Liswell*, 6 Cow. (N. Y.) 659; *Matter of Carhart*, 2 Dem. (N. Y.) 627; *Ex p. Dean*, 2 Cow. (N. Y.) 605; 14 Am. Dec. 521; *Hoffman v. Duel*, 5 Johns. (N. Y.) 232; *Judd v. Fulton*, 10 Barb. (N. Y.) 117; *Commercial Bank v. Ives*, 2 Hill (N. Y.) 355; *Magnusson v. Williams*, 111 Ill. 450; *Chicago, etc., R. Co. v. Evans*, 39 Ill. App. 261; *Roan v. Rohrer*, 72 Ill. 582; *Bowman v. Wood*, 41 Ill. 203; *Ewing v. Bailey*, 5 Ill. 420; *Higgins v. Halligan*, 46 Ill. 173; *Harper v. Ely*, 56 Ill. 179; *Pugh v. Reat*, 107 Ill. 440; *Waterman v. Jones*, 28 Ill. 55; *People v. Hatch*, 33 Ill. 14; *Richardson v.*

Ford, 14 Ill. 332; *Vairin v. Edmonson*, 10 Ill. 270; *Zimmerman v. Cowan*, 107 Ill. 631; 47 Am. Rep. 476; *Brown v. Chicago*, 117 Ill. 21; *Prior v. People*, 107 Ill. 628; *Weld v. Barker*, 153 Pa. St. 465; *Browne v. Browne*, 3 S. & R. (Pa.) 496; *Sims v. Hampton*, 1 S. & R. (Pa.) 411; *Weeks v. Hull*, 19 Conn. 376; *Sands v. Lyon*, 18 Conn. 18; *Evans v. Bowers*, 13 Colo. 511; *Wright v. Maus*, 111 Ind. 422; *Kimm v. Osgood*, 19 Mo. 60; *White v. Haworth*, 21 Mo. App. 439; *Deere v. Hucht*, 32 Mo. App. 153; *St. Louis v. Bambrick*, 41 Mo. App. 648; *Smith County v. Labore*, 37 Kan. 486; *Beckwith v. Douglas*, 25 Kan. 229; *Conklin v. Marshalltown*, 66 Iowa 122; *Lang v. Phillips*, 27 Ala. 311; *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68; *Loosse v. Vogel*, 80 Ala. 308; *State v. Mounts*, 36 W. Va. 179; *Wing v. Davis*, 7 Me. 31; *Peables v. Hannaford*, 18 Me. 106; *Ward v. Walters*, 63 Wis. 39; *Elder v. Bradley*, 2 Sneed (Tenn.) 247; *Gorham v. Wing*, 10 Mich. 486; *Chaddock v. Barry*, 93 Mich. 542; *Warren v. Slade*, 23 Mich. 1; 9 Am. Rep. 70; *Shelton v. Gillett*, 79 Mich. 173; *Anderson v. Baughman*, 6 Mich. 298; *Burr v. Lewis*, 6 Tex. 76; *Hill v. Kerr*, 78 Tex. 213; *White v. German Ins. Co.*, 15 Neb. 660; *State v. Weld*, 39 Minn. 426; *Spencer v. Haug*, 45 Minn. 231; *Hall v. Cassidy*, 25 Miss. 48; *Howbert v. Heyle*, 47 Kan. 58; *State v. Winter Park*, 25 Fla. 371; *Sheldon Bank v. Royce*, 84 Iowa 288; *Backer v. Pyne*, 130 Ind. 288; *Baltimore, etc., R. Co. v. Flinn*, 2 Ind. App. 55; *Montgomery v. Souder*, 8 Lanc. L. Rev. (Pa.) 185; *Pellew v. Wonford*, 9 B. & C. 134; 17 E. C. L. 343.

In *Lester v. Garland*, 15 Ves. 248, the Master of the Rolls said: "It is not necessary to lay down any general rule upon this subject, but, upon technical reasoning, I rather think it would be more easy to maintain that the day of an act done or event happening ought, in all cases, to be excluded than that it should in all cases be included."

In *Carothers v. Wheeler*, 1 Oregon 194, the court said: "We hold upon authority, as well as in accordance with the rule laid down in our statute, that the time within which an act is to be done, shall be computed by excluding

the first day and including the last." See also *Hahn v. Dierkes*, 37 Mo. 574.

Under a statute requiring that certain penalties incurred by railroad companies shall be sued for within ten days, the day on which the penalty is incurred is to be excluded. *People v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 284.

In computing the time in which a debtor, who has been arrested on execution, and given bond, must apply and be admitted to take the oath prescribed for poor debtors, the statute fixes the method of computation, which is to be exclusive of the day of the arrest. *Bell v. Adams*, 10 N. H. 181. See also *Odiorne v. Quimby*, 11 N. H. 224.

By the *New Hampshire* Rev. Sts., ch. 1, § 25, one uniform rule is established excluding the day of the date in all cases not otherwise provided for. *Scovell v. Holbrook*, 22 N. H. 269; *LaFavour v. Bartlett*, 42 N. H. 555; *Soldiers' Voting Bill*, 45 N. H. 613.

The day on which judgment is rendered is not to be included in the computation of the two years within which a writ of error may be sued out. *Lubbock v. Cook*, 49 Tex. 96.

A proper construction of the *Texas* Act of 1846, to regulate proceedings in the district courts, requires that the day of the meeting of the court should be excluded, in the computation of the time in which a defendant is allowed to file his answer. *Hollis v. Francois*, 1 Tex. 118.

In *Cromelien v. Brink*, 29 Pa. St. 522, the doctrine formerly held by the courts that the first day of the computation is to be excluded, was reaffirmed, and the reason supporting the cases of *Bigelow v. Willson*, 1 Pick. (Mass.) 485, and *People v. Sheriff*, 19 Wend. (N. Y.) 87, adopted. It was held that land sold for taxes on the 10th of June, 1850, was redeemed in time on the 10th of June, 1852; the law requiring the redemption to be made within two years after the sale. See also *Marks v. Russell*, 40 Pa. St. 372, *aff'g* *Goswiler's Estate*, 3 Pen. & W. (Pa.) 200; *Duffy v. Ogden*, 64 Pa. St. 240.

Where a contract recited that defendants conveyed to plaintiff certain real estate by deed dated November 25, 1848, and covenanted "that if at the expiration of one year from the date of said deed, said O. shall prefer to reconvey said land and house, and shall offer to do the same, that the undersigned shall accept such reconveyance

of said land and house, and shall pay to said O. therefore the sum of sixteen hundred dollars," it was held that an offer made by the plaintiff on November 26, 1849, was made on the proper day, and entitled him to recover the money. *Oatman v. Walker*, 33 Me. 67.

Where a lien claim required by statute to be filed at or before the expiration of six months after materials were furnished, it was held that a claim filed for record on the 9th of July was in sufficient time; the last item in the account for materials furnished having been delivered on the 9th of January preceding, this day being excluded in the calculation. *Trustees v. Heise*, 44 Md. 453.

In *Goswiler's Estate*, 3 Pen. & W. (Pa.) 200, it was held that whenever by a rule of court, or an act of the legislature, a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken or the decision made, is excluded.

In computing the time within which an action of account is barred by the Statute of Limitations, the day on which the cause of action arose is to be excluded. *Menges v. Frick*, 73 Pa. St. 137; 13 Am. Rep. 731. See also *Cascade v. Lewis*, 148 Pa. St. 334; *McCulloch v. Hopper*, 47 N. J. L. 189; 54 Am. Rep. 146; *State v. Jackson*, 4 N. J. L. 323; *Den v. Drake*, 8 N. J. L. 303; *Day v. Hall*, 12 N. J. L. 203.

In *Evans' Case*, 29 N. J. Eq. 571, the question was as to the computation of the ten days from the death of the testator, after which time a will might be proved before a surrogate. It was held that where the testator died on the 19th of the month, the admission of his will to probate on the 29th of the month was contrary to law; the statute declaring in explicit terms that the will should not be admitted to probate until after ten days.

The thirty days' grace allowed by a mortgage for the payment of interest after it has become due and payable, are to be counted exclusive of the day on which the interest becomes due. *Serrell v. Rothstein*, 49 N. J. Eq. 385.

In *Nebraska*, the rule of computation excluding the first day and including the last, is prescribed by statute. *Monell v. Terwilliger*, 8 Neb. 360.

In *Chapman v. Allen*, 33 Neb. 129, it was held that proceedings in error commenced July 9, 1891, where judgment had been rendered July 8, 1890,

2. From the Date, or from the Day After the Date.—The words “from the date,” or “from the day after the date” have the same meaning, and are to be construed as they may best effectuate the presumed intention of the parties who employ them;¹ but, in the

were not within one year from the rendition of the judgment in the court below; the year expiring on the 5th of July, 1891.

In *Camm v. Warren*, 1 Houst. (Del.) 188, under a rule of court requiring ten days' notice of the time of laying down pretensions to land, it was held that a notice dated and served on the fifth, where the survey was made on the fifteenth, was sufficient.

A statutory rule for computing time does not apply where the first or last day on which an act may be done is expressed in the instrument. *Northwestern Guaranty Loan Co. v. Channell* (Minn. 1893). 55 N. W. Rep. 121.

Promissory Notes.—Where a note is made payable in a given number of days, the day of the date is excluded in computing the time. *Leavitt v. Simes*, 3 N. H. 14; *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240; *Homes v. Smith*, 16 Me. 181; *Blanchard v. Hilliard*, 11 Mass. 85; *Woodbridge v. Brigham*, 12 Mass. 403; 7 Am. Dec. 85; *Preshrey v. Williams*, 15 Mass. 192; *Blitch v. Brewer*, 83 Ga. 333; *Henry v. Jones*, 8 Mass. 453; *Hicks v. Blanchard*, 60 Vt. 673.

“Clear Day.”—Where a statute prescribes a certain number of clear days, both the day on which the notice is served and the day of the proceeding must be excluded. *Stewart v. Meyer*, 54 Md. 454. See also *Walsh v. Boyle*, 30 Md. 262; *Hoffman v. Duel*, 5 Johns. (N. Y.) 232; *Rex v. Cumberland*, 4 N. & M. 378; *Barber v. Chandler*, 17 Pa. St. 48; 55 Am. Dec. 533; *Reg v. Shropshire*, 8 Ad. & El. 173; 35 E. C. L. 367; *Reg. v. Middlesex*, 3 D. & L. 109; *Mitchell v. Foster*, 12 Ad. & El. 472; 40 E. C. L. 98; *Watson v. Eales*, 23 Beav. 294.

In *Gillispie v. White*, 16 Johns. (N. Y.) 117, *Spencer, J.*, said: “It is the practice of this court and the King's Bench, where any act is to be done within a specified number of days, to consider the day on which notice is given, and the day on which the act is to be done, the one inclusive, and the other exclusive, without any particular designation that the one or the other shall be exclusive.” See also *Owen v. Slatter*, 26 Ala. 547; 62 Am. Dec. 745;

Irving v. Humphreys, Hopk. (N. Y.) 364; *Jones v. Planters' Bank*, 5 Humph. (Tenn.) 619; 42 Am. Dec. 471; *Manning v. Dove*, 10 Rich. (S. Car.) 395; *Meredith v. Chancey*, 59 Ind. 466; *Stebbins v. Anthony*, 5 Colo. 348; *In re Senate Resolution*, 9 Colo. 632; *Knoxville City Mills Co. v. Lovinger*, 83 Ga. 563.

In computing the time of delivering a list of a jury, the day of delivery and the day of trial must both be excluded. *State v. McLendon*, 1 Stew. (Ala.) 195. See also *Cook v. Gray*, 6 Ind. 335; *Jackson v. Vaulkenburgh*, 8 Cow. (N. Y.) 260; *Sanders v. Norton*, 4 T. B. Mon. (Ky.) 464; *Robinson v. Foster*, 12 Iowa 186; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120; *Coquard v. Bochmer*, 81 Mich. 445; *Delaware, etc., R. Co. v. Mehrhof Bros. Co.*, 53 N. J. L. 205; *Willey v. Laraway*, 64 Vt. 566.

The rule that, in computing certain legal days, neither the day of the notice nor that on which the act is to be done are included, does not apply to art. 361, C. C., which provides that agreements between tutors and their wards arrived at the age of their majority, are null, unless preceded by a full account and vouchers rendered ten days previous to the agreement. *Hodgson v. Roth*, 33 La. Ann. 941. See also *State v. Ellis*, 40 La. Ann. 793.

The *New York Code Civ. Proc.*, § 788, regulating the computation of time, applies to courts not of record. *Dorsey v. Pike*, 46 Hun (N. Y.) 112.

1. *Oatman v. Walker*, 33 Me. 67.

By some of the adjudged cases, a distinction has been made between the date, and the day of the date of a written instrument. This distinction can be of no practical use, and is well calculated to mislead. *Weeks v. Hull*, 19 Conn. 376.

In *Pugh v. Leeds*, Cowp. 714, the question was whether the execution of a lease for twenty-one years to commence from the day of the date, was a compliance with a power reserved in a marriage settlement to lease for twenty-one years in possession but not in reversion, and it depended on the question whether the phrase “to commence from the day of the date” was to be

absence of particular circumstances, they are to be taken to exclude the day of the date.¹

construed exclusively or inclusively of the day on which the lease bore date. After a minute examination of all the cases which had been decided on the construction of the words "from the day of the date" used in instruments, the court, through Mansfield, J., established the principle that the meaning of the phrases was the same, and that neither of them was to have an absolute and invariable sense attached to it, but that they were to receive an exclusive or inclusive construction according to the intention with which they were used, to be derived from the context and subject-matter, and so as to effectuate and not destroy the deeds of parties. See also *Sands v. Lyon*, 18 Conn. 18.

1. In *Seekonk v. Rehoboth*, 8 Cush. (Mass.) 371, Shaw, C. J., said: "We consider it now well settled as a general rule, that when an act is to be done within a given number of days from the date, or day of the date, or act done, the day of the date is excluded; otherwise, an act to be done in one day must be done on the same day; and as there is no fraction of a day, such stipulation must create an obligation to do it *instantly*." See also *Fuller v. Russell*, 6 Gray (Mass.) 128; *Millett v. Lemon*, 113 Mass. 355; *Wiggin v. Peters*, 1 Met. (Mass.) 127; *Page v. Weymouth*, 47 Me. 238; *Lorent v. South Carolina Ins. Co.*, 1 Nott & M. (S. Car.) 505; *Smith v. Dickey*, 74 Tex. 61; *Williams v. Burgess*, 12 Ad. & El. 635; 40 E. C. L. 142; *Ammerman v. Digges*, 12 Ir. C. L. R. App. 1.

In *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Rep. 470, it was held that under the provisions of the statute requiring a copy of the writ and of the return of the attachment of bulky personal property, to be deposited in the town clerk's office at any time within three days thereafter, the day of the attachment is to be excluded in computing the three days within which copies may be deposited in the clerk's office.

In *Bigelow v. Willson*, 1 Pick. (Mass.) 485, Wilde, J., said: "We are warranted by the authorities to say, that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation. And that this rule of construction is

never to be rejected, unless it appears that a different computation was intended. So, also, if we consider the question independent of the authorities, it seems to me impossible to raise a doubt. No moment of time can be said to be after a given day, until that day has expired." See also *Calvert v. Williams*, 34 Md. 672; *Cummins v. Homes*, 11 Ill. App. 158.

Where, by the rules of practice of the court, any subsequent proceeding in the cause is required to be had in a limited time, or within a certain number of days from or after any previous proceedings, the whole of the day on which the order was entered is to be excluded in the computation of time. But where previous notice of a motion or of any other proceeding in a suit is required to be given, the whole of the day on which the notice was served is to be included in the computation of time, and the day upon which the motion is to be made is excluded. *Vandenburgh v. Van Rensselaer*, 6 Paige (N. Y.) 147. See also *Bissell v. Bissell*, 11 Barb. (N. Y.) 96.

In *Rand v. Rand*, 4 N. H. 267, the court said: "In the computation of time from a date, or from the day of a date, we consider the settled rule in this state to be, that the day of the date is to be excluded." See also *Sheets v. Sheldon*, 2 Wall. (U. S.) 177; *Blake v. Crowninshield*, 9 N. H. 304; *Priest v. Tarlton*, 3 N. H. 94; *Chiles v. Smith*, 13 B. Mon. (Ky.) 461; *Batman v. Megowan*, 1 Metc. (Ky.) 548; *White v. Crutcher*, 1 Bush (Ky.) 473; *Handley v. Cunningham*, 12 Bush (Ky.) 401; *Pyle v. Maulding*, 7 J. J. Marsh. (Ky.) 202; *Wood v. Com.*, 11 Bush (Ky.) 220; *Pugh v. Reat*, 107 Ill. 440; *Carson v. Love*, 8 Yerg. (Tenn.) 215; *Goode v. Webb*, 52 Ala. 452; *Atkins v. Sleeper*, 7 Allen (Mass.) 487; *Perry v. Provident L. Ins. Co.*, 99 Mass. 162; *Wayne v. Duffy*, 1 Phila. (Pa.) 367; *Hampton v. Ehrenzeller*, 2 Brown (Pa.) 18; *Blackman v. Nearing*, 43 Conn. 56; 21 Am. Rep. 634; *McGavock v. Pollack*, 13 Neb. 535.

In *Wilcox v. Wood*, 9 Wend. (N. Y.) 346, the court said: "Where reference is had to the day of date for computing time, I know of no decision in this state settling the point."

In the computation of time upon

III. RULE AS TO FRACTIONS OF A DAY.—(See DAY, vol. 5, p. 89.)

IV. USE OF THE WORDS "UNTIL" AND "TILL."—The use of the word "until" generally implies an intention to exclude the day to which it refers, unless a contrary intention appears from the context of the statute or instrument in which the word is used.¹ The word "till" has been held to include the day to which it is

service of notice of trial, the day of service is to be excluded, and the first day of term is included. *Easton v. Chamberlin*, 3 How. Pr. (N. Y. Supreme Ct.) 412; *Daton v. McIntyre*, 5 How. Pr. (N. Y. Supreme Ct.) 117.

In *Seward v. Hayden*, 150 Mass. 158; 15 Am. Rep. 183, Knowlton, J., said: "In reckoning from a day or a date, the rule generally adopted excludes the day from which the reckoning runs. Many early cases stated a distinction between computations from a day or a date, and computations from an act done or from an event. But this distinction does not rest upon a sound principle, and in most jurisdictions it is no longer recognized. The tendency of recent decisions is very strongly towards the adoption of a general rule which excludes the day as the *terminus a quo* in such cases. But this rule is not inflexible; and in the interpretation of a statute or contract, it yields to a manifest purpose or intention in conflict with it."

In *Lysle v. Williams*, 15 S. & R. (Pa.) 135, the day a bond was dated was included in computing the time for issuing a *scire facias*.

In *Columbia Turnpike Road v. Haywood*, 10 Wend. (N. Y.) 422, the rule is laid down that in determining the time within which process or notice must be served, the language of the statute must be observed; and where an act is to be done in a certain number of days before a day stated, then that day is excluded in the computation. See also *Chaddock v. Barry*, 93 Mich. 543; *Arnold v. Nye*, 23 Mich. 286; *Charles v. Stansbury*, 3 Johns. (N. Y.) 261.

Where the terms of a policy of insurance required assessments to be paid within thirty days from the date of the notice thereof, it was held that the day on which the notice was received should be excluded. *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88.

Where land was sold for taxes on the fourth day of May, 1865, and the collector delivered his deed for the land to the purchaser on the fourth day

of May, 1866, it was held that the one year which the owner had to redeem land from the sale and to pay the taxes, had not expired, and that, consequently, the deed was executed prematurely. *Annan v. Baker*, 49 N. H. 161.

Where an act of the legislature, November 29, 1871, required all field notes that had been withdrawn from the land office to be returned in twelve months from its passage, it was held that the return of the notes on November 29, 1872, was in time. *Hill v. Kerr*, 78 Tex. 213.

1. *Ryan v. State Bank*, 10 Neb. 524; *Kendall v. Kingsley*, 120 Mass. 94; *Nichols v. Ramsel*, 2 Mod. 280; *Wickler v. Norris*, Cas. Temp. Hardw. 116; *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Rep. 470; *Atkins v. Boyleston F. & M. Ins. Co.*, 5 Met. (Mass.) 439; 37 Am. Dec. 692.

Where a trader petitioned the court of bankruptcy for arraignment under 12 & 13 Vict., ch. 106, § 211, praying that his person might be protected from all process until further order, the commissioner made an order which, after reciting the petition, proceeded thus: "I hereby grant such protection in order that the personal property of the trader be protected from process until the 29th of July next," and the court appointed a meeting for twelve o'clock on that day for the creditors to assent to or dissent from the arraignment proposed by the trader. The court held that the word "until" in the order must be understood inclusive of the 29th of July, the day until which the protection was given. *Backhouse v. Mellor*, 4 H. & N. 116; 28 L. J. Ex. 141; 5 Jur. N. S. 175.

A party insured his goods against fire, with an insurance company, by policy for six months, whereby it was provided that from the 14th of February, 1868, "until" the 14th of August, 1868, or so long after as the assured should pay the sum of \$225.00, and the company at the time above mentioned accept the same, the fund should be liable to make good losses by fire to the goods. The assured intended to

prefixed.¹ But "till next term of court" has been said not to include the time during the next term nor any part of it.²

V. SOLAR AND STANDARD TIME.—The only standard of time recognized by the courts is the meridian of the sun, and an arbitrary standard set up by persons in a certain line of business will not be recognized.³ The presumption is that common time (*i. e.* solar) is that relied on, when there is nothing to show that a different mode of measuring time has been in general use.⁴

VI. SUNDAY IN THE COMPUTATION OF TIME.—As a general rule, where an act is required to be done in any certain number of days after or before a fixed time, Sunday is to be included in computing the number of days, when it exceeds seven. If it is less than seven, Sunday must be excluded.⁵ But this is a mere

keep up his policy and the company knew his intention; but the renewal of premium was not demanded or paid on the 14th of August, 1868. On that day a fire took place which destroyed the goods. The course of business between the assured and the company was that the company should come to the assured and demand the renewal premium. It was held that under the terms of the policy the whole of the 14th of August was protected, and that the company was, therefore, liable for loss caused by fire happening on that day. *Isaacs v. Royal Ins. Co.*, L. R., 5 Exch. 296; 39 L. J. Ex. 109; 22 L. T. 681; 18 W. R. 982.

Where the charter of the bank was continued in force "until the first day of January, 1850," it was held that the word "until" was used in an exclusive sense, and that the charter of the bank expired December 31, 1849. *People v. Walker*, 17 N. Y. 502.

In *Webster v. French*, 12 Ill. 302, under a statute providing that bids from all persons should be received "until the first of July, 1849, at which time all the bids received shall be opened and compared," it was held that the time for receiving bids terminated when that day began.

"On" and "To."—Where a lease was given for ten years "to end on the first day of May," it expired 12 o'clock on that day. But a lease given "to the first day of May" would expire on April 30th at 12 o'clock midnight. *People v. Robertson*, 39 Barb. (N. Y.) 9.

1. *Bunce v. Reed*, 16 Barb. (N. Y.) 352; *Dawkins v. Wagner*, 3 Dowl. Pr. Cas. 535.

2. *DeHaven v. DeHaven*, 46 Ind. 296.

3. In *Henderson v. Reynolds*, 84 Ga. 159, the court said: "It seems idle to

waste words in saying that the standard of time fixed by persons in a certain line of business, cannot be substituted at will by persons in a certain locality for the standard recognized by the statutes of the state as well as the general law and usage of the country. . . . To allow the railroads to fix the standard of time would be to allow them at pleasure to violate or defeat the law."

The time appointed for the sitting of the court must be understood as the mean time at the place where the court sits, and not Greenwich time, unless it is so expressed. *Curtis v. March*, 3 H. & N. 866; 28 L. J. Ex. 36; 4 Jur. N. S. 1112.

4. In *Searles v. Averhoff*, 28 Neb. 668, a summons was duly issued and served on the defendant on a certain day at 10 a. m. At the time stated in the return of the summons, the plaintiff appeared, but the defendant did not. The justice then waited one hour, standard time, and rendered judgment against the defendant by default. Before 11 a. m., common time, the defendant appeared and asked leave to make his defense, which was refused. It was held that the justice should have waited until 11 a. m., common time, and that the judgment was rendered prematurely.

5. *Haley v. Young*, 134 Mass. 366; *Snell v. Scott*, 2 Mich. N. P. 108; *Anonymous*, 2 Hill (N. Y.) 375, note b; *Thayer v. Felt*, 4 Pick. (Mass.) 354; *Hannum v. Tourtellott*, 10 Allen (Mass.) 494.

In *Cunningham v. Mahan*, 112 Mass. 58, the court, by Morton, J., said: "When a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited

rule of expediency and does not usually govern when there are other considerations. Thus, Sunday is frequently excluded, even where the time is more than seven days, because it is evident that, in fixing a specified time, working days were meant.¹

exceeds a week, Sunday is included in the computation; but if less than a week, Sunday is excluded.

In *Cooley v. Cook*, 125 Mass. 406, it is said by Gray, C. J.: "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded or the intention of the legislature to exclude them is manifest. See also *Alderman v. Phelps*, 15 Mass. 225; *Ex p. Dodge*, 7 Cow. (N. Y.) 147; *Rowberry v. Morgan*, 9 Exch. 730.

The *Minnesota* constitution provides that the governor may sign certain bills within three days after the adjournment of the legislature. A bill was presented to him on the 8th and on the same day the legislature adjourned *sine die*. He signed it on the 12th, an intervening day being Sunday. The court held that the intervening Sunday must be excluded in computing the three days. *Stinson v. Smith*, 8 Minn. 366; *Farwell Co. v. Matheis*, 48 Fed. Rep. 363. A similar case is that of *People v. Hatch*, 33 Ill. 149 (though the rule of the text is not applied). It is there held that the ten days during which the executor is allowed to retain a bill before signing it or returning it with his objections do not include Sunday. So that where a bill was sent to the governor and on the eleventh day thereafter at noon the legislature adjourned, he had until the first day of the next session in which to return it.

Under a *Michigan* statute requiring short summons issued from a justice's court to be made returnable in two days, Sunday is not to be included in the two days. *Simonson v. Durfee*, 50 Mich. 50.

The twenty-four hours allowed to a party to claim an appeal, must be hours exclusive of Sunday. *McNiffe v. Wheelock*, 1 Gray (Mass.) 603.

Sunday is excluded from the three days allowed for filing a bill of exceptions. *Crowley v. McLaughlin*, 141 Mass. 181.

Under a statute requiring six days

publication of a notice (such notice being in the nature of process), publication on Sunday is not to be counted. *Scammon v. Chicago*, 40 Ill. 146.

So where a notice is required to be published each day for a week, publication for the six days is sufficient. *Matter of Excelsior F. Ins. Co.*, 16 Abb. Pr. (N. Y.) 8.

Where the thirty days, during which property attached on *mesne* process is held subject to execution, expires on Sunday, the lien of the attachment does not continue to the next day. *Alderman v. Phelps*, 15 Mass. 225. See for other cases on this general subject, *Com. v. Certain Intoxicating Liquors*, 97 Mass. 601, *Penniman v. Cole*, 8 Met. (Mass.) 501; *Casey v. Viall*, 17 R. I. 348. But this general rule may vary according to the circumstances of the case. Thus, it is said that in computing the time during which a defect in a highway must have existed, in order to render the town liable for an injury occasioned thereby, Sunday is to be included; and this, though the time is less than seven days. *Flagg v. Milbury*, 4 Cush. (Mass.) 243.

The English Rule.—The English authorities stated the rule thus: "The general rule of the law is, that days means consecutive days, except Sunday be the first or last day. But in mercantile cases, it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage." *Alderson, B.*, in *Brown v. Johnson*, 1 C. & M. 444; 41 E. C. L. 245. Mr. Benjamin, citing this case, said: "Where a certain number of days is to be allowed for the delivery of goods under a contract of sale, they are to be counted as consecutive days, and include Sundays, unless the contrary be expressed, and any usage to that effect be shown." *Benj. on Sales* (4th Am. ed.), § 684; *Cockran v. Retberg*, 3 Esp. 121. See also *Peacock v. Reg.*, 4 C. B. N. S. 264; 93 E. C. L. 262, where it is held that Sunday, even though it be the last day, is to be computed in the three days allowed for an application to the justices to state a question for the opinion of one of the superior courts.

1. When Only Working or Judicial

If the period fixed by decree, order, or statute for an act to be done closes on Sunday, the act may, as a rule, be done on the following day, though there is strong authority for a different view.¹ So, if a contract matures on Sunday, the next day is the

Days are Meant.—The *Alabama* constitution limits the sessions of a legislature to fifty days. It was held that this meant fifty working days and that Sundays were to be excluded in the computation of the length of the session. *Alabama* Const., art. 4, § 5; *Ex p. Cowert*, 92 Ala. 96; *Moog v. Randolph*, 77 Ala. 597. See also *People v. Hatch*, 33 Ill. 149. Compare *Franklin v. Hoiden*, 7 R. I. 215 (Sunday counted in the forty-eight hours immediately after verdict in which motion for new trial may be made). And the twenty-four hours allowed after judgment before execution can issue, do not include Sunday. *Penniman v. Cole*, 8 Met. (Mass.) 496.

So, also, where four days are allowed in which an appeal may be taken, only working days are to be counted. *Neal v. Crew*, 12 Ga. 100.

Under a statute requiring that notice must issue to the owner of intoxicating liquors seized under a search warrant, in twenty-four hours after the seizure, Sunday must be excluded in the computation of the time specified. *Com. v. Certain Intoxicating Liquors*, 97 Mass. 601.

An act provided that it should be unlawful for any railroad company to allow any freight received for shipment to remain unshipped for over five days, unless otherwise agreed upon by the shipper. It was held that five full running days were meant, that Sundays were to be counted; so that if Sunday was the fifth day, the penalty was incurred on Monday. *Branch v. Wilmington, etc., R. Co.*, 77 N. Car. 347; *Keeter v. Wilmington, etc., R. Co.*, 86 N. Car. 346; 9 Am. & Eng. R. Cas. 165.

A *Missouri* statute provided that all motions for a new trial or an arrest of judgment should be made within four days after the trial. It was held that this meant four judicial days and that Sunday was, therefore, not to be counted. *National Bank v. Williams*, 46 Mo. 17. See also *Bacon v. State*, 22 Fla. 46. An opposite view was taken in *King v. Dowdall*, 2 Sandf. (N. Y.) 131.

Where a statute provided that objections to special assessments were to

be made one day before the meeting of the common council, and a party objecting had no notice of his assessment until Saturday, it was held that a confirmation of the assessment could not be made by the council on Monday, because the party objecting was entitled to at least one *dies juridicus* in which to make his objection. *Burton v. Chicago*, 53 Ill. 87.

1. When the last day of the fixed period falls on Sunday, see *Barnes v. Eddy*, 12 R. I. 25; *Cock v. Bunn*, 6 Johns. (N. Y.) 326; *Stryker v. Vanderbilt*, 27 N. J. L. 68; *Bacon v. State*, 22 Fla. 46; *Goswiler's Estate*, 3 Pen. & W. (Pa.) 200; *Spencer v. Haug*, 45 Minn. 231; *Sims v. Hampton*, 1 S. & R. (Pa.) 411; *Johnson v. Merritt*, 50 Minn. 303; *Campfield v. Cook*, 92 Mich. 626; *Lee v. Carlton*, 3 T. R. 642; *Bullock v. Lincoln*, 1 Str. 914; *Hammond v. American Mut. L. Ins. Co.*, 10 Gray (Mass.) 306; *Whart. Contr.*, § 897; *DAY*, vol. 5, p. 82. Compare *Kilgour v. Miles*, 6 Gill & J. (Md.) 268.

It is said, however, that the ten days allowed by U. S. Rev. Sts., § 2931, in which to serve a protest against duties imposed, is not extended, by the fact that the last day falls on Sunday, to the following Monday. *Shefer v. Magone*, 47 Fed. Rep. 872, citing *Dorsey v. Pike*, 46 Hun (N. Y.) 112; *Pearpoint v. Graham*, 4 Wash. (U. S.) 241; *Davies v. Miller*, 130 U. S. 284. Compare, also, *Massachusetts* doctrine, *Haley v. Young*, 134 Mass. 356, where a rule contrary to that of the text is laid down.

Redemption of Land Sold Under a Mortgage or for Taxes.—It has been held in one case, however, in apparent contradiction to the rule of the text, that where the last day of the three years limited for the redemption of land from a mortgage falls on Sunday, a tender of the amount due on the mortgage on the following day is too late. *Haley v. Young*, 134 Mass. 364; *Allen v. Elliott*, 67 Ala. 432; *Cunningham v. Mahan*, 112 Mass. 58.

The *New York* courts establish a different doctrine. The Code of Civil Procedure, section 1454, as to the redemption in sheriff's sales, provides that certain creditors may redeem from

one on which the performance is to be exacted;¹ except that when the last day of grace falls on Sunday payment must be

other redeeming creditors, provided it be done "within twenty-four hours after the last previous redemption." Where the last previous redemption was made on Saturday, it was held that the creditor wishing to redeem might have all the following Monday in which to do so, the intervening Sunday, being a *dies non*, was to be excluded. *Porter v. Pierce*, 120 N. Y. 217, *aff'd* 43 Hun (N. Y.) 11; *Salter v. Burt*, 20 Wend. (N. Y.) 205; 32 Am. Dec. 530.

In *Gage v. Davis* (Ill. 1887), 14 N. E. Rep. 36, a notice of the expiration of the time of redemption of land sold for taxes which specifies that such time will expire on November 3d, that day being Sunday, is wholly ineffectual for its intended purpose, and is, therefore, void, since *Illinois* Rev. Stat., ch. 100, § 6, requires that if the last day to be computed in a given period of time be Sunday, it shall be excluded from the computation. See *Gage v. Bailey*, 100 Ill. 530.

A *Kansas* statute provided that where real estate had been sold for taxes, the owner or his agent might at any time in three years from the date of sale redeem the same. The day of sale was always to be excluded in computing the three years in pursuance of the rule stated in the text. It was held that where the three years expired on Sunday, the owner might have all of the next day in which to redeem. *English v. Williamson*, 34 Kan. 212; *Cable v. Coates*, 36 Kan. 191; *Hicks v. Nelson*, 45 Kan. 51; 23 Am. St. Rep. 709. See also *Douglas v. Rinehart*, 5 Kan. 392; *Hook v. Bixby*, 13 Kan. 164. The same view is taken in *Indiana*. *Backer v. Pyne*, 103 Ind. 288.

Recordation of Mortgage.—In *Paine v. Mason*, 7 Ohio St. 206, a statute of *Ohio* required a chattel mortgage to be rerecorded within the thirty days next preceding the expiration of the year from the original filing. The original filing was on May 21, 1853. May 21, 1854, being Sunday, he refiled his mortgage on the following day, Monday. It was held that it was filed too late and that the mortgage was postponed in favor of subsequent mortgages acquired in good faith. The court, by Brinkerhoff, J., said: "On this point the adjudicated cases are clear and decisive." The rule is very clearly laid down in *Burr v.*

Lewis, 6 Tex. 76, where it was held that the courts in the construction of their own rules of practice generally exclude Sunday in the computation of time. But where a statute directs that an act shall be done within a certain number of days, Sunday cannot be excluded, although it should be the last day. To the same effect is *Ex p. Dodge*, 7 Cow. (N. Y.) 147. See also *Hannum v. Tourtellott*, 10 Allen (Mass.) 494 (Sunday not included in the three days allowed in which to record an attachment); *CHattel Mortgages*, vol. 3, p. 195.

1. *Bass v. White*, 65 N. Y. 566; *Barrett v. Allen*, 10 Ohio 426 (tender due on Sunday good when made on Monday); *Whart. Contr.*, § 897; *Salter v. Burt*, 20 Wend. (N. Y.) 205; 32 Am. Dec. 530; *Brown v. Johnson*, 10 M. & W. 331; *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137; *Sands v. Lyon*, 18 Conn. 18; *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240; 3 *Randolph Com. Paper*, § 1032; *Spokane Falls v. Browne*, 3 Wash. 84 (time for notice of appeal). See also *Sheldon v. Benham*, 4 Hill (N. Y.) 129; 40 Am. Rep. 271; *City Bank v. Cutter*, 3 Pick. (Mass.) 414.

So, if a policy of insurance falls due on Sunday, it may be paid on the next Monday, and this, although the policy provided that it should terminate in case the premium charged shall not be paid on or before the day at noon on which the same shall become due and payable. *Hammon v. American Mut. L. Ins. Co.*, 10 Gray (Mass.) 306; *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 299.

"Where the day is in terms fixed by the parties, how can a court change their words and make it earlier than they have done?" *Bishop on Contracts* (enlarged ed.), § 1438.

Negotiable Instruments.—Days of Grace.—If a negotiable note falls due on Sunday, demand must be made on the Saturday preceding. *Homes v. Smith*, 20 Me. 264; *Story on Notes* (7th ed.), § 220; *Story on Bills* (4th ed.), § 338; *Salter v. Burt*, 20 Wend. (N. Y.) 205; 32 Am. Dec. 530.

In *Nebraska*, the rule is otherwise by statute, and presentment and demand may be made on Monday when the third day of grace falls on

made on the day preceeding.¹ But where, as in some cases, an act is to be done by a certain day, which happens to be Sunday, or within a certain time, which ends on Sunday, performance must be on Saturday at the latest, unless the act is one which may properly be done on Sunday.² Where compensation is to be paid by the day, Sunday is to be excluded, in the absence of a special provision otherwise.³ And Sunday is never to be counted as one of the days of a term of court.⁴

TIMEPIECE.—See note 5.

TIME-TABLES.—(See CARRIERS OF PASSENGERS, vol. 2, p. 738; RAILROADS, vol. 19, p. 775; TICKETS AND FARES, vol. 25, p. 1074.)

I. Definition, 14.

II. Obligation of Carriers to Conform to, 15.

I. DEFINITION.—A time-table is a statement setting forth the time at, or in, which something is to take place. The most gen-

Sunday. *Nebraska Comp. Sts.*, ch. 41, § 8; *First Nat. Bank v. McAllister*, 33 Neb. 646.

And if the last day of grace be Sunday, the grace expires on Saturday, and the note is payable then. *Whart. Contr.*, § 897; *Bishop Contr.*, § 1438; *Story on Notes* (7th ed.), 220; *Farnum v. Towle*, 12 Mass. 89, 7 Am. Dec. 35; *Barlow v. Planters' Bank*, 7 How. (Miss.) 129. See also *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137.

In *Texas*, the usual rule prevails, that is, that if a note without grace falls due on Sunday, payment may be made on the following Monday. But by statute, if Monday is a holiday, payment must be made on Saturday. *Rev. Stat. of Texas*, arts. 2835-2837; *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452.

Much of this subject is a matter of statute, in many jurisdictions, and the holding of the authorities in each case must be considered in the light of the statute existing where it is made. See 3 *Randolph Com. Paper*, §§ 1032, 1033.

1. *Fleming v. Fulton*, 6 How. (Miss.) 473 (demand must also be made on Saturday); *Colms v. Bank of Tennessee*, 4 Baxt. (Tenn.) 422; 3 *Randolph Com. Paper*, §§ 1032, 1033.

This rule is altered by statute in *Nebraska*, and presentment (and presumably payment) is sufficient when made on Monday. *First Nat. Bank v. McAllister*, 33 Neb. 646.

2. **Act to be Done by or Within a Certain Time—Sunday Included.**—*Keating v. Serrell*, 5 Daly (N. Y.) 282; *Startup*

v. McDonald, 6 M. & G. 593; 46 E. C. L. 591; *Day*, vol. 5, pp. 85, 86; *Bishop on Contr.*, § 1438; *Allen v. Elliott*, 67 Ala. 432; *Haley v. Young*, 134 Mass. 364.

In *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. (N. Y.) 449, a party had contracted to deliver a certain quantity of oil during the month of May. The 31st of May fell on Sunday. It was held that delivery on the first day of June would not satisfy the contract.

An act required to be done within twenty-four hours after notice, must, it seems, be done on Sunday, if the circumstances are such as require it, and the act is not in violation of the Sunday law. *Casey v. Viall*, 17 R. I. 348, citing *Rowberry v. Morgan*, 9 Exch. 730; *Peacock v. Reg.*, 4 C. B. N. S. 264; 93 E. C. L. 262.

A statute of *Colorado* requires that the statement of an election contest shall be filed within ten days after the day when the votes are canvassed. Under this, the time is not extended to Monday because the last day of the ten falls on Sunday. *Brown v. Vailes* (Colo. 1891), 14 L. R. A. 120.

3. In *Patterson v. Patterson*, 2 Pears. (Pa.) 170, a contract to pay demurrage was, in view of the statutory prohibition against labor on Sunday, construed to exclude Sunday; no express provision on the subject being contained in the contract. *Rigney v. White*, 4 Daly (N. Y.) 400.

4. *Read v. Com.*, 22 Gratt. (Va.) 924; *Michie v. Michie*, 17 Gratt. (Va.) 109.

5. A chronometer was held to be a timepiece, within the meaning of a

eral use of the term is in connection with railroads and other carriers, when it consists usually of a printed recital of the hours of arrival and departure of trains or other conveyances for the carriage of passengers.¹

II. OBLIGATION OF CARRIERS TO CONFORM TO.—It is the duty of a railroad company to run its trains in conformity with the time-tables issued for the benefit of the public, and it may be liable for damages sustained as a direct result of its failure to do so.² But the obligation is not an absolute and unconditional one, for the

statute providing that no carrier should be liable for the loss of articles of a certain kind, unless the value had been declared and an insurance price paid, among which were enumerated a time-piece. *LoCoutier v. London, etc., R. Co.*, 6 Best & S. 961; 118 E. C. L. 959.

1. A tabular statement of the time at which, or within which, something is to take place, as the recitations in a school, the departure or arrival of trains and other public conveyances, the rise and fall of the tides and the like. Webster's Dict.

2. *Denton v. Great Northern R. Co.*, 5 El. & B. 860; *Buckmaster v. Great Eastern R. Co.*, 23 L. T. 471; *Dunlop v. Edinburgh, etc., R. Co.*, 16 Jur. 407; *Hamlin v. Great Northern R. Co.*, 1 Hurlst & N. 408; *Savannah, etc., R. Co. v. Bonaud*, 58 Ga. 180; *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Lafayette R. Co. v. Sims*, 27 Ind. 59.

In *Denton v. Great Northern R. Co.*, 5 El. & B. 860, a leading case on this subject, it was shown that a time-table advertised that a certain train would leave London at 5 p. m., reaching Petersborough at 7 p. m., and thence to proceed, amongst other places, to Hull. The plaintiff went to the station at the advertised time, intending to take passage, but found that there was no such train, nor had there been one during any part of the month during which their schedule was advertised. In delivering the opinion of the court, Campbell, C. J., said: "It seems to me that railways would not be that benefit and accommodation to the public which we find them to be if the representations made in their time-tables are to be treated as so much waste paper and not considered as the foundation of a contract. I think the plaintiff is entitled to recover both on the ground that there was a contract, and, also, for false representations. I think there was a binding contract, and that the case is the same as if the com-

pany should publish in express terms that if customers would come to a particular station at a particular hour, a train would be passing at that hour, and that any person who tendered his fare should have a ticket and be carried from that station to some other given station."

In *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510, it was held that when the plaintiff relied upon the representation being fraudulently made, he should aver that he acted thereon.

Willful Detention—By the Conductor.—Where any detention is caused by the willful and unreasonable delay of the officer in charge, the company itself is liable. *Weed v. Panama R. Co.*, 17 N. Y. 364. In this case, the railroad company was held liable for an injury resulting from the willful detention of a train by the conductor, delaying it several hours. See also *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48; 75 Am. Dec. 372.

Failure to Stop at Stations as Advertised.—If common carriers fail to stop their trains at stations advertised as stopping places, whereby those who have been induced to take passage on the faith of such advertisements, are prevented from boarding or alighting from the train, they are liable for damages. *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391; *Purcell v. Richmond, etc., R. Co.*, 108 N. Car. 414, 47 Am. & Eng. R. Cas. 457; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 66; 76 Am. Dec. 785; *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456; 6 Am. & Eng. R. Cas. 341. But the passenger should consult, of course, the published time-tables, though he may rely upon the statements of the agents from whom he bought his ticket. *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703.

company is not liable for want of punctuality, or failure to comply with the schedule, which is not due to their negligence,¹

Failure to Make Connections as Advertised.—In *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310; 115 E. C. L. 310, the plaintiff sued to recover damages resulting from a delay of one hour, which caused his failure to meet a train on the Midland Railway, thereby delaying his arrival at his destination until the next day. The ticket bore the imprint "Cardiff to New Castle, via Midland Railway." Such a ticket does not, of itself, prove a contract to the effect that the company issuing it will run their trains in connection with those upon the Midland road, nor will the statement of a trainman have this effect. In order to prove such a contract, the time-tables of the company should have been produced. In delivering his opinion, Erle, C. J., said: "If there were any such contract here, it would appear from the time-tables published by the company, and if the plaintiff (whose duty it was to do so) had put in the time-bill, we should have seen what the real contract was, viz., that the company do not warrant that their trains shall arrive with punctuality at the times indicated at the different stations."

Obligation to Employés—Injury to.—It is the duty of railroad corporations to prescribe, either by means of time-tables or by other suitable means, regulations for running their trains with a view to their safety, but it is obvious that obedience to these regulations must be entrusted to the employés having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation or any general agent can personally oversee, and as to which employés must be relied upon. Where failure to observe the rules which have been prepared by the company for the running of its trains resulted in an injury to a fellow-servant, and no negligence could be imputed to the defendant, no recovery could be had. *Rose v. Boston, etc., R. Co.*, 58 N. Y. 217. And see *Sheehan v. N. Y. C., etc., R. Co.*, 91 N. Y. 332.

As regards the change in the time of running the train, it is held that all that is required of the company is that it should use due care and diligence in giving notice thereof, and it is not required that the master should

see to it personally that notice of such change comes to the knowledge of all those to be governed thereby. In *Slater v. Jewett*, 85 N. Y. 61, it is said: "Is it the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table, or is his duty done when he has, beforehand, provided rules, minute, explicit and efficient, and made them known to his servants, which, if observed and followed by all concerned, will bring such personal notice to everyone entitled to it? We think that in the circumstances of this case, the latter clause of the query propounds the true rule, and should be answered affirmatively."

Contributory Negligence of.—In *Georgia Railroad & Banking Co. v. McDade*, 59 Ga. 73, where the printed rules which accompanied the schedules given to employés warned both conductors and engineers that they would be held responsible for the satisfactory running of the schedules, it was held that an engineer could not excuse himself for failing to conform thereto, by the fact that he acted under orders from the conductor. But in *Pennsylvania R. Co. v. Roney*, 89 Ind. 453; 12 Am. & Eng. R. Cas. 223, it was held that where the orders given to an engineer by the governing or superior officers of the company, require him to run in a different manner from that prescribed by the rules, and other trains of the class of that placed in his charge are so run, with the knowledge and by the direction of the governor's officers, then negligence cannot be imputed to the engineer, although he does not follow the general rules.

1. *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596; 13 Am. Rep. 97. In this case plaintiff had purchased tickets of the defendants, entitling him to passage between two stations on their road. The time-table published by the company advertised a train as leaving Salem, one of these stations, at 8:45 a.m. The plaintiff was at Salem with the intention, and in time, to take this train, but it did not stop. The defendants offered to prove that their road was suitably equipped to accommodate any excess of travel to be usually expected on extraordinary occasions, but,

although it has been held that any deviation from the published time-tables renders the company liable.¹ The time-tables are subject to the implied condition that such changes may be made therein as may be considered necessary, after reasonable notice, actually brought to the intended passenger or published as extensively as the original advertisement;² and express conditions and stipulations in the time-tables limiting the liability of the carriers, which are just and reasonable, are parts of the engagement.³

that on the morning in question, the train was already overloaded before reaching Salem, and to have taken on the unusual number waiting there would have been dangerous; further, that the train consisted of nineteen cars, and if it had stopped at Salem, being on an up grade, it would have been impossible to start it again, and that after the arrival of the train at its destination, and as soon as safety would permit, it was sent back to Salem to bring on those desiring transportation. It was held that the company was not liable, if it had done all that due skill and care could do to carry the plaintiff punctually; and that the proposed evidence was admissible, as tending to show that the company's failure to carry the plaintiff was not due to negligence on its part.

In *Woodgate v. Great Western R. Co.*, 51 L. T. N. S. 826, where the plaintiff on Christmas Eve had taken a first-class ticket, on which was a reference to the regulations on the company's time-table from Paddington to Bridgenor, the junction being at Hartleybury, the regulations stated that the company would not be responsible for any delay unless upon proof that it arose from the willful misconduct of the company's servants, but that it was to be understood that trains would not start from the various stations before the appointed time. The traffic was great, there was a fog, a stoppage, and the line was blocked. Under these circumstances the train reached Hartleybury too late to make connection, and the plaintiff was sent on by a second-class carriage attached to a goods train, arriving at his destination about four hours late. He then sued the company for damages, and the judgment by the lower court for damages amounting to £1 was set aside by the provisional court.

Question for the Jury.—Whether in a given case due diligence requires that a train should leave on schedule time,

or whether persons upon it, not as passengers, should alight from it before the time of departure fixed by the schedule, is a question of fact for the jury to determine. *Harris v. Central R. Co.*, 78 Ga. 525; 30 Am. & Eng. R. Cas. 581.

1. See Angell on Car. (4th ed.) 527a; *Hawcroft v. Great Western R. Co.*, 8 Eng. L. & Eq. 362. See comment of the court upon this case in *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596; 13 Am. Rep. 97.

2. *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433; 92 Am. Dec. 780. In this case, the posting of handbills in the cars and at the stations was held to be insufficient notice to one who had previously purchased a ticket in accordance with the time-table existing at the time of the purchase.

3. See CARRIERS OF PASSENGERS, vol. 2, p. 738; CARRIERS OF GOODS, vol. 2, p. 771.

In *M'Cartau v. North Eastern R. Co.*, 54 L. J. Q. B. 441, the county court judge held that there was an implied contract that the railway company would use reasonable diligence to secure punctuality, and were liable for damages when, through a delay of thirty-seven minutes, the plaintiff failed to connect with a train on another road. The defendants appealed and the divisional court reversed the decision on the ground that on the outside of the company's time-table there was a notice that they would not be liable for unpunctuality. The court said, by Haddleston, B.: "We must look here at what is the contract; and the contract is to be collected from the tickets, the time-tables and the conditions, and we must construe them with the best powers which we possess." This notice constituting part of the contract relieved the company from liability.

In *Denton v. Great Northern R. Co.*, 5 El. & B. 860, a condition in the schedule that "the companies make every exertion that trains shall be

Time-tables issued merely for the use and government of employes do not amount to engagements with the general public.¹ Nor will the mere statement of a company's agent that the time for transportation is a certain time, constitute an agreement to carry in that time.²

TIPLING HOUSE.—A place of public resort where spirituous, fermented or other intoxicating liquors are sold or given away, to be drunk in small quantities on the premises.³

punctual, but their arrival and departure at the time stated will not be guaranteed," did not exempt the company from damages where the train was altogether taken off.

In *Le Blanche v. London, etc., R. Co.*, 1 C. P. D. 286, it was held that the words "every attention will be paid to punctuality as far as practicable," used in certain conditions attached to the time table, imported a contract that the company would use due attention to insure punctuality, but that they were not to be held responsible for delays arising from circumstances unconnected with the management of the train.

It is customary now for railroad companies to insert notices in their time-tables to the effect that they do not warrant the trains to arrive and depart at the precise time indicated. *Lord v. Midland R. Co., L. R.*, 2 C. P. 339; *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310; 115 E. C. L. 310; *Prevost v. Great Eastern R. Co.*, 13 L. T. N. S. 20.

In *Thompson v. Midland R. Co.*, 34 L. T. 34, the plaintiff took a ticket from a railway company on the faith of its published schedule. On the back of the ticket was printed "this ticket is subject to the regulations and conditions stated in the company's time-tables and bills," and the time-table stated this condition, "that the company did not hold itself responsible for any delay, detention, etc., arising off its lines or from the acts or defaults of the other parties, nor for the correctness of the times over other lines or companies." Where the purchaser of the ticket was detained by the lateness of another company's train, he could not recover damages for such detention, but was bound by the monthly time-table.

"Other Cause."—In *Buckmaster v. Great Eastern R. Co.*, 23 L. T. 471, a stipulation in the ticket that the company shall not be liable for any delay

in the starting or arrival of trains arising from accident or "other cause," was held to include "other causes" in the nature of accidents, and not any cause whatever.

1. In *Beauchamp v. International, etc., R. Co.*, 56 Tex. 239; 9 Am. & Eng. R. Cas. 307, it was held that a time-table which on its face announces that it is for the government and information of employes only, and in terms reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not complying therewith. See also *Denver, etc., R. Co. v. Pickard*, 8 Colo. 163; 18 Am. & Eng. R. Cas. 284.

2. *Strohn v. Detroit, etc., R. Co.*, 23 Wis. 126; 99 Am. Dec. 114. A mere casual conversation with a person whose duty it is to open and shut the carriage doors or the like, cannot amount to evidence of a special contract with the company. *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310; 34 L. J. C. P. 264.

3. *Emporia v. Volmer*, 12 Kan. 622; *Morrison v. Com.*, 7 Dana (Ky.) 218; *Patten v. Centralia*, 47 Ill. 370; *Harris v. People*, 1 Colo. App. 289; *Minor v. State*, 63 Ga. 318. See also *INTOXICATING LIQUORS*, vol. 11, p. 693.

In *Koop v. People*, 47 Ill. 329, it was defined to be a public drinking house.

In *Harney v. State*, 8 Lea (Tenn.) 113, it was held, under a statute making it a misdemeanor, subject to fine and imprisonment, to sell or "tipple" any intoxicating beverage within four miles of any institution of learning, that the buyer of the liquor is not guilty of the offense; but *Turney, J.* (in which *McFarland, J.*, concurred), held that both the seller and buyer are necessary to the offense, and that "tipple," in its legal sense, means a sale and consumption; that the seller cannot tipple by himself, but must have a purchaser, who of course is a party to the tipling.

TITLE INSURANCE—(See also **INSURANCE**, vol. 11, p. 278).—A contract of title insurance is one whereby the title of real estate is insured. The business is usually carried on by companies, as in the case of other kinds of insurance. And the practice of such companies is substantially as follows: To have the title to specified property examined on application of the purchaser and the abstract of title prepared, the correctness of which is guaranteed, whereupon a policy is issued to such purchaser stipulating that he shall be indemnified for any loss that may arise to him by reason of a defect in the title.¹

Under the *Tennessee* statutes, the courts have defined a "tippling house" to be a place where spirituous liquors are sold, without license, in less quantities than a quart, or in any quantity to be drank on the place. *Harney v. State*, 8 Lea (Tenn.) 114; *Dunnaway v. State*, 9 Yerg. (Tenn.) 350; *Sanderlin v. State*, 2 Humph. (Tenn.) 315.

In *Minor v. State*, 63 Ga. 318, it was held that if liquors were given away by the drink, or other small quantity, it constituted the house a tippling house. This was the case of a social club, each member of which contributed a certain sum on or before the Saturday preceding each Sunday, for the purpose of purchasing liquors necessary for the use of the club the following Sunday, and it was held to be a tippling house. And see *Marmont v. State*, 48 Ind. 21.

In *Hussey v. State*, 69 Ga. 54, it was held to make no difference in law whether a place be called a barroom, glee club, parlor, or restaurant; if it be a place where liquor is retailed and tippled, if it have a door for entrance so that anybody can push it open, enter and drink, the proprietor is guilty of keeping a tippling house. Nor does it matter whether the drinking be done standing or sitting, whether at the bar or around a table; in either event it is tippling, and the place where it is done is a tippling house.

1. The organization of title insurance companies is of such recent date that decisions bearing upon their rights, liabilities, etc., are as yet rare.

The *Pennsylvania* Act of May 9, 1886, which provides for the incorporation of companies to insure titles, does not empower them to engage in the business of conveyancing, and to an action upon a title insurance policy, it is no defense that the conveyancing was done by the conveyancer of the

plaintiff. *Gauler v. Solicitors*, L. & T. Co., 9 Pa. Co. Ct. Rep. 634.

False Answers.—To a question as to what was the last price paid for certain property, upon an application for a policy of insurance of title to land, the answer was \$11,000, and if it was provided in the policy that an untrue answer would avoid the same, such answer amounted to a warranty, and its immateriality was of no moment. Again, the question called for the actual and not the nominal price. Of the \$11,000 stated in the deed as the consideration, only \$3,000 was paid in money, the rest being the transfer of certain mining stock, to the amount, par value, of \$15,000, but which the jury found to be worth very little, and the instruction of the court that if the jury found that the \$3,000, together with a fair market value of the stock, aggregated \$11,000, or if they believed that the plaintiff honestly thought he was paying \$11,000 in full cash value, and the other party accepted the same as \$11,000 in money, then they should find the answer true, was sufficiently favorable to the plaintiff. *Stensgaard v. St. Paul Real Estate Title Ins. Co.* (Minn. 1892), 52 N. W. Rep. 910.

The Records Kept by Title Guaranty Companies Private Property.—In *Ex p. Calhoun*, 87 Ga. 359, it was held that an officer of a title guaranty company could not be forced by a subpoena *duces tecum*, in a suit to establish lost public records, to produce the abstract books of the company which contained copies of the public records of land conveyances. In delivering the opinion of the court in this case, Bleckley, C. J., said: "These abstract books called for by the subpoena came into existence as the result of private enterprise and labor, and were afterwards purchased by this private corporation at great expense. They are its private

TITLE (REAL PROPERTY).—(See also EJECTMENT, vol. 6, p. 195; REAL COVENANTS, vol. 19, p. 973; REAL PROPERTY, vol. 19, p. 1028; SPECIFIC PERFORMANCE, vol. 22, p. 908. As to title by escheat, see ESCHEAT, vol. 6, p. 854; title by occupancy, see ABANDONMENT, vol. 1, p. 1; by adverse possession, ADVERSE POSSESSION, vol. 1, p. 225; by estoppel, ESTOPPEL, vol. 7, p. 19; by prescription, PRESCRIPTION, vol. 19, p. 6; by forfeiture, FORFEITURE, vol. 8, p. 443; by accretion, ACCRETION, vol. 1, p. 136; by public grant, GRANTS, vol. 9, p. 43; PUBLIC LANDS, vol. 19, p. 305; by office grant or matter of record, GRANTS, vol. 9, p. 43; by private grants, REAL PROPERTY, vol. 19, p. 1028; GRANTOR AND GRANTEE, vol. 9, p. 19; DEEDS, vol. 5, p. 423; LEASE, vol. 12, p. 974; REAL COVENANTS, vol. 19, p. 973; as to title by devise, see LEGACIES AND DEVISES, vol. 13, p. 7; WILLS.)

I. Nature of Title, 20.

1. *Definition*, 20.

2. *Elements or "Stages" of Title*, 21.

a. *In General*, 21.

b. *Possession*, 27.

(1) *How Far Does Possession Give a Right*, 27.

(2) *Possession as Evidence of Title*, 29.

(a) *Generally*, 29.

(b) *Bare Possession*, 29.

(c) *Prior Possession*, 31.

(d) *Prior Possession as Against "Color of Title"*, 32.

(e) *"Outstanding Title" in Ejectment*, 32.

(f) *"Outstanding Title" of the Government*, 35.

(g) *As Ground for Damages for Discontinuance of Highway*, 37.

(h) *Possession Under the Statute of Limitations*, 37.

(i) *"Color of Title"*, 37.

c. *Color of Title*, 37.

(1) *Generally*, 37.

(2) *Definition*, 40.

(3) *Effect*, 41.

(4) *"Good Faith"*, 41.

(5) *How Acquired*, 45.

(6) *Under Statutes*, 46.

II. Modes of Acquisition of Title, 48.

1. *General Classification*, 48.

2. *Title by Descent* (See SUCCESSION, vol. 24, p. 344), 49.

3. *Title by Purchase*, 49.

I. NATURE OF TITLE—1. Definition.—Title in real property, according to classic authorities, is the means whereby a man holdeth land.¹ It may be said to be the collection of all the

property and are used by it in the conduct of its corporate business. They have never been published. Their contents are kept secret, except as disclosed, piecemeal, in furnishing to applicants therefor abstracts of title relating to specified parcels of real estate; and the furnishing of such abstracts is carried on as a business for pay and profit. The value of the books consists mainly in the secrecy of their contents. Were the information which they afford rendered accessible to the public by other means, the demand for it through the one source now available would be diminished if not destroyed."

1. This is the familiar definition of Coke, Blackstone, and all of the older authorities. Co. Lit. 345 B; 2 Bl. Com. 195; 3 Washb. Real Prop. 399. This definition, without regard to its absolute accuracy, certainly requires further elucidation. If the statement of a modern writer of standing be taken as a basis in the discussion of ownership, "every right is a consequence attached by the law to one or more facts which the law defines. . . . When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights. . . . The word 'possession' denotes such a group of facts." See Holmes on The

facts on which ownership is founded, or by which ownership is proved.¹

2. Elements or "Stages" of Title—*a. IN GENERAL.*—In the older books there are said to be three stages or degrees in a complete title—the mere possession; the right of possession, which may be apparent or real; and the mere right of property.²

Common Law 214. In the light of this statement, it would seem that title, in its strict application to real property, denotes a collection of all the facts of ownership; and this view appears confirmed in the traditional mode of division, where the several parts or stages of a complete title are separated into the several progressive rights of ownership, each of them based upon a progressive and partial collection of these facts, on the total sum of which the right of absolute ownership is founded. See, in this connection, Burton on Real Prop., § 418; Kaines, Law Tracts 98; Maine's "Ancient Law," p. 256; Taylor on Civil Law 476—cited in 3 Washb. Real. Prop. 399.

1. See the last note; also the succeeding section in the text and the notes under it. "When the existence of any right of property . . . is in question, every fact which constitutes the title of the person claiming the right . . . is deemed relevant." Steph. on Ev., art. 5.

2. Mere Possession.—Mere possession is said to exist when one man, without any pretense of right, invades the premises of another, by force or surprise, and turns him out of the occupation of his land. This is called disseisin. Other instances where mere possession may be gained, to which the law applies special terms, are abatement and intrusion. The first occurs where, after the death of the ancestor, and before the entry of the heir, a stranger gains possession of the land to the exclusion of him who had the right to enter. The second exists where a stranger gains possession after the death of a particular tenant, and before the entry of the remainderman or reversioner.

Right of Possession.—This is said to exist in disseisin as above described, where the disseisor has actual possession and the disseisee the right of possession. Such right of possession was protected by remedies no longer known by the law; such as the right to enter and turn out the disseisor, or the right to make continual claim, that is, to

make claim as near the premises as possible, repeated once in every year and a day. The right of possession was said to be of two kinds, apparent and actual.

Apparent Right of Possession.—This was founded on the maxim, now abolished, that descent tolls seisin (*descensus tollit seisinam*) whereby, when the disseisor's unlawfully acquired possession descended to his heir, the latter's right was superior to his ancestor's, in that he could be dispossessed only by an action at law, and not by a mere entry. This principle was modified by Stat. 32, Hen. VIII, ch. 33, and has been abolished in most, if not all, of the states.

Actual Right of Possession.—This is the only one of these stages or degrees of title which is of importance in modern law. It exhibits the only mode recognized by the law by which a title may be acquired on the foundation of mere possession. At common law, it was said to exist where the person disseised failed to bring his possessory action within the requisite time, thereby losing such remedy and leaving in his adversary an actual right of possession.

Mere Right of Property.—This was at common law the last degree or stage in a complete title, and was what remained in the owner after he had lost the possession and the right of possession, both apparent and actual. This right was founded on the fact that when the owner had neglected to bring his possessory action within the requisite time, he still had a further period within which to bring an action by which he claimed a mere right of ownership. Other instances when this right existed were when the estate tail was discontinued by a feoffment by the tenant in tail, such right of property remaining in the heirs in tail, and in the remainderman; and, finally, when the owner had lost the right of possession by a judgment in a possessory action.

This right of property was founded on and protected by the writs of right

In so far as these stages or degrees of title are in themselves the foundation of independent rights of ownership, as was the case in early law, their treatment is no longer of practical use. With the disappearance of the various kinds of real remedies and real actions, especially of the so-called writs of right, these various grades of title have merged into one,¹ which may be acquired in a variety of ways.²

The mention of possession as an element of title seems to proceed in the minds of many writers from a theory regarding the origin of ownership in land, in early stages of society, and in this aspect has no place here.³

The chief importance of possession seems to be as a fact in issue or as part of the evidence to prove ownership. "Possession, *per se*, evidences no more than the mere fact of present occupation by right. . . . Undoubtedly, if a person be found in possession of land, claiming it as his own in fee, it is *prima facie* evidence of his ownership, and seisin of the inheritance."⁴

in early law, for which there existed a period of limitation longer than that which barred possessory actions. As these writs of right have been practically abolished, the foundation for the distinction between the right of property and the actual right of possession no longer exists, and, in fact, this actual right of possession may be said to be in every respect coincident with absolute ownership. (The union of all these stages in the complete title was said to constitute,—the last two the *jus duplicatum*, or *droit droit*, or the *jus proprietatis et possessionis*—all three the *juris et seisinæ conjunctio*—distinctions which have to-day hardly even a theoretic value.) For a discussion of the three stages or degrees of a complete title at common law, see 2 Minor's Insts. 447-451; 2 Bl. Com. 195-199; Co. Litt. 153, n.; 4 Kent's Com. 373; 3 Washb. Real Prop. *400.

1. This will be found discussed in the text below in this section and in the corresponding note.

2. See *infra*, this title, *Modes of Acquisition of Title*.

3. See 3 Washb. Real Prop. *482, citing 2 Sharswood's Bl. Com. 196, and note; Wood's Civil Law 78, 126; 2 Washb. Real Prop. 399, and the authorities cited, notably Maine's "Ancient Law," where the common theory that property had its origin in possession is denied. See 2 Bl. Com. 3, 4; 2 Kent's Com. 318. But see 2 Minor's Inst. 3, where the theory is maintained that while between nations property originated in occupancy, individuals

first obtained particular portions of territory by the actual or implied sanction of the community.

In *Campbell v. Holt*, 115 U. S. 620, Miller, J., said: "Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of anything tangible by one person to his own use to the exclusion of others. And legislatures and publicists have always acknowledged its efficacy in confirming or creating title." See *LIMITATION OF ACTIONS*, vol. 13, p. 694.

4. Story, J., in *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

It can hardly be doubted that all so-called rights less than a complete title, such as the right inherent in possession, are nothing but facts in evidence by which ownership is proved. From some of these facts, such as possession, presumptions more or less strong are said to arise of ownership, according as they are accompanied by other incidental facts, such as claim or color of title, and thus it follows that the whole question of title is merely one of evidence or presumption, and that nothing but confusion can result from considering such evidential facts as rights (however incomplete) of ownership. In harmony with this view, the title to land may be proved in many ways; it cannot be said to be a definite whole composed always of certain fixed parts. What in one case is essential to the complete proof of ownership may in another case be dispensed with. This

is strikingly shown by the fact that possession of land even for less than the statutory period, may give a complete title. See *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

Hodgdon v. Shannon, 44 N. H. 572, is an interesting case as showing the various acts, tests, and declarations of ownership which may be submitted to a jury to determine the title to land. Thus, in a writ of entry to recover a tract of land upon execution as the property of a judgment debtor, where the defendant claimed as tenant of certain devisees of the mortgagee of said land, it was held that the question whether the mortgagees ever foreclosed for condition broken, and the mortgagee subsequently exercised acts of ownership over premises, or otherwise, were proper questions for the jury. See *Jackson v. Wood*, 12 Johns. (N. Y.) 242; 7 Am. Dec. 315; *Giles v. Baremore*, 5 Johns. Ch. (N. Y.) 545; Ang. on Lim. 493. Likewise, the payment of taxes (*Little v. Downing*, 37 N. H. 355; *Farrar v. Fessenden*, 39 N. H. 277; *Carr v. Dodge*, 40 N. H. 403), the description of the property in an application for a policy of insurance, the claim of ownership, and the giving of the note binding the party to pay losses, were all held direct acts of ownership, and explanatory of the possession of the party. See *McCall v. Neely*, 3 Watts (Pa.) 69; *Nepan v. Doe*, 2 Sm. Ld. Cas. 493; Ang. on Lim. 425. Declarations of the mortgagee were likewise held to have been correctly admitted, upon the ground that she was first found by the jury to be in actual possession of the premises under her deed. The declarations were received as explanatory of the character of the possession, and as giving color and limits to the same. See 1 Greenl. on Ev., §§ 109, 110; *Currier v. Gale*, 14 Gray (Mass.) 504. See also 1 Greenl. on Ev., § 153, citing *Jones v. Williams*, 2 M. & H. 331; *Doe v. Kemp*, 7 Bing. N. Cas. 332; *Simpson v. Dendy*, 36 Eng. L. & Eq. 366.

In *Currier v. Gale*, 14 Gray (Mass.) 504, the extent of the rule which admits the declarations of a party in possession, adverse to his own interest, was considered. The declarations of a deceased occupant were here offered by the defendant for the purpose of showing that the declarant occupied as tenant of another, and adversely to the plaintiff. The court held the evidence admissible, saying: "Such dec-

larations have in various forms and under different circumstances been deemed admissible. The principle upon which they are held admissible is not very clearly settled. When the declaration has been accompanied with an act pointing out some monument or existing mark of boundary, it has been allowed. So, also, as evidence against the party making the declaration, and all persons in privity with him, or claiming under him, it is competent. But the adjudicated cases go somewhat further, and hold that his declaration in disparagement of his apparent title, as indicated by his possession, may be used as evidence that his occupation was an occupation under another person, and thus make his possession to avail in favor of the person stated by him to be his landlord. Thus, in *Peaceable v. Watson*, 4 Taunt. 16, it was held that the declarations of a deceased occupant of land, stating under whom he occupied as tenant, were admissible, *Mansfield, C. J.*, saying: 'Possession is *prima facie* evidence of seisin in fee simple; the declaration of the possessor that he is tenant to another makes most strongly, therefore, against his own interest, and consequently is admissible.' *Davies v. Pierce*, 2 T. R. 53, is an authority to the same point. The case of *Marcy v. Stone*, 8 Cush. (Mass.) 4; 54 Am. Dec. 736, is directly to the same effect. If these declarations were offered as the declarations of deceased persons, while occupying the premises, they would have been, therefore, admissible." The court concluded that the evidence proved that defendant had acquired by possession and occupation a legal, although not indefeasible, title to the land; that he was lawfully seised and possessed of it against all the world, except the true owner; that his title passed to the grantees and to their assignees with the covenant of warranty, and that, in an action for the breach of this covenant, defendant could not set up in defense a constructive seisin or possession in a stranger. So it was said in *Jackson v. Porter*, 1 Paine (U. S.) 457, that it is not possession alone but possession accompanied with the claim of the fee, which, by construction of law, is deemed *prima facie* evidence of such an estate. See *Buswell on Lim. & Adverse Possession*, § 237. For the same reason a squatter cannot acquire title, unless he has denied the title of the lawful owner. See *Sacket v. McDonnell*, 8 Biss. (U. S.)

The discussion of these several stages or degrees of title may, however, rest on the view that while they are insufficient in themselves to constitute separate rights of ownership, they are each indispensable to a complete title. In this sense possession, at least constructively, together with the actual right of possession, may be considered indispensable elements of a complete title;¹ but a mere right of property, distinct from the actual right of possession, has, it seems in modern law, disappeared as a requisite, as well as an independent foundation, on which to establish a right of ownership. While the early effect of the Statute of Limita-

394; *Bartholomew v. Edwards*, 1 *Houst. (Del.)* 17; *Ruffin v. Overby*, 88 *N. Car.* 369; *Tuttle v. Jackson*, 6 *Wend. (N. Y.)* 213; 21 *Am. Dec.* 306. As to the effect of payment of taxes, see *Webb v. Richardson*, 42 *Vt.* 465; *Sorber v. Willing*, 10 *Watts (Pa.)* 141; *Naglee v. Albright*, 4 *Whart. (Pa.)* 291. See also, as to actual possession, *Humphreys v. Rawson*, 8 *Watts (Pa.)* 79; *Robinson v. Lake*, 14 *Iowa* 421; *Hawk v. Senseman*, 6 *S. & R. (Pa.)* 21; *Price v. Brown*, 101 *N. Y.* 669; *Bear Valley Coal Co. v. Dewart*, 95 *Pa. St.* 72. As to the effect of the particular circumstances of each case, see *Turner v. Hall*, 60 *Mo.* 271; *West v. Lanier*, 9 *Humph. (Tenn.)* 762; *Corning v. Troy Iron, etc., Factory*, 44 *N.Y.* 577; *Clancey v. Hondlette*, 39 *Me.* 451; *Ford v. Wilson*, 35 *Miss.* 490; 72 *Am. Dec.* 137; *Booth v. Small*, 25 *Iowa* 177; *Cook v. Babcock*, 11 *Cush. (Mass.)* 210; *Little v. Downing*, 37 *N. H.* 367. As to actual occupation, cultivation, etc., see *Langworthy v. Myers*, 4 *Iowa* 18; *Morrison v. Kelley*, 22 *Ill.* 624; 74 *Am. Dec.* 169; *Kane v. Footh*, 70 *Ill.* 587; *Blood v. Wood*, 1 *Met. (Mass.)* 335; *Bailey v. Carleton*, 12 *N. H.* 9; 37 *Am. Dec.* 190; *Royall v. Lisle*, 15 *Ga.* 545; *Denham v. Holeman*, 26 *Ga.* 191; 71 *Am. Rep.* 98; *Doolittle v. Tice*, 41 *Barb. (N. Y.)* 181; *Brown v. Cockerell*, 33 *Ala.* 47; *School Dist. No. 8. v. Lynch*, 33 *Conn.* 330; *Alexander v. Polk*, 39 *Miss.* 755; *Samuels v. Borrow-scale*, 104 *Mass.* 207.

The possession must be held *animo claudendi*. *Grant v. Fowler*, 39 *N. H.* 101; *Jackson v. Wheat*, 18 *Johns. (N. Y.)* 44; *Magee v. Magee*, 37 *Miss.* 152; *Davenport v. Lebring*, 52 *Iowa* 364; *Grube v. Wells*, 34 *Iowa* 150; *Perkins v. Nugent*, 45 *Mich.* 156; *Harvey v. Tyler*, 2 *Wall. (U. S.)* 328; *Smith v. Stevens*, 82 *Ill.* 554. See also *Society, etc. v. Pawlet*, 4 *Pet. (U. S.)* 480; *Ewing v. Barnett*, 11 *Pet. (U. S.)* 41; *La Frombois v. Jackson*, 8 *Cow. (N.*

Y.) 609; 18 *Am. Dec.* 463; *Ford v. Wilson*, 35 *Miss.* 504; 72 *Am. Dec.* 137; *Hall v. Stevens*, 9 *Met. (Mass.)* 418; *Day v. Cochran*, 24 *Miss.* 261; *Clarke v. McClure*, 10 *Gratt. (Va.)* 305; *Floyd v. Mintsey*, 7 *Rich. (S. Car.)* 181; *Criswell v. Altemus*, 7 *Watts (Pa.)* 581; *Long v. Mast*, 11 *Pa. St.* 189.

Under *REAL COVENANTS*, vol. 20, p. 993, will be found a distinction between possession and seisin, together with an account of the doctrine of "actual seisin," which obtains in *Massachusetts, Maine*, and, in a qualified form, in *Ohio*.

1. *Constructive Possession*.—In the common phrase the legal title is said to draw to it the possession. 3 *Washb. Real Prop.* §485.

See *Green v. Watkins*, 7 *Wheat. (U. S.)* 28, where (on a writ of right), the court, by Story, J., said: "It has been already decided by this court, and is indeed among the best established doctrines of the common law, that seisin in deed, either by possession of the land and perception of profits, or by construction of law, is indispensable to enable the demandant to maintain his suit."

In *Morrison v. Kelly*, 22 *Ill.* 609, *Walker, J.*, said: "The doctrine is well recognized and established that a man may have the actual possession of real estate without a residence upon it. And it may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaptation to use; constructive, as when a person has the paramount title, which in contemplation of law draws to and connects with it the possession." See *Hunnicutt v. Peyton*, 102 *U. S.* 333. As to "actual possession," see *ACTUAL*, vol. 1, p. 184g *et seq.*; *ADVERSE POSSESSION*, vol. 1, p. 255, and cases there cited.

Three important instances of con-

structive possession, as considered in questions of title to land, are said to exist. First, as above stated, where the legal title is said to draw to it the possession of the whole land, in the absence of ouster or adverse possession of the whole or of any part. See the cases above cited. Second, where, though there may be adverse possession of a part under color of title to the whole, if the legal owner be in actual possession of a part also, he has the constructive possession of all the land not in the actual possession of the adverse holder. Third, where one enters on unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed or title.

In *Hunnicut v. Peyton*, 102 U. S. 333, it is said: "The true owner will be deemed to be disseised to the extent of the boundaries described in that title. Still his possession beyond the limits of his actual occupancy is only a constructive one. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, the constructive possession is in him of all the land not in the actual possession of the intruder, and this, though the owner's actual possession is not within the limits of the defective title. 'The reason is plain. Both parties cannot be seised at the same time of the same land under different titles. The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title.' *Clarke v. Courtney*, 5 Pet. (U. S.) 319. . . . One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy. The true owner may not know the extent of the defective title asserted against him, and if, while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretense. . . . In *Altemus v. Long*, 4 Pa. St. 254; 45 Am. Dec. 688, it was ruled that, though actual possession under a junior title of part of a tract of land, which interfered with an older grant, gave possession of the whole to the holder of the junior title, yet a subsequent entry of the true owner

upon any part of his land was an ouster of the intruder from what he had in constructive possession merely. We know of no authoritative decision that is in conflict with this." But see *infra*, this title, *Color of Title—Generally*.

In 3 Washb. Real Prop. *485, it is said: "There is also a constructive possession without being a possession in fact, if accompanied by an entry under 'color of title,' as it is called, as where one, under a title-deed describing a parcel by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is included in his deed, though he actually occupies but a part; nor can he be disseised except by an actual entry and occupancy by another, and only to the extent of such occupancy. So the legal title to wild lands draws to it the possession, unless it has been interrupted by an actual entry and adverse possession by another." See *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; and the note to *Ewing v. Burnet*, 11 Pet. (U. S.) 41. But see *infra*, this title, *Color of Title—Generally*; *Den v. Hunt*, 20 N. J. L. 487; *Foulke v. Bond*, 41 N. J. L. 527.

Possession and Seisin.—In *Slater v. Rawson*, 6 Met. (Mass.) 439, the question was, whether one who had had actual possession of land, and had sold timber therefrom for a number of years, was seised for the purpose of liability to an action on his covenant of warranty. The court regarded it as indisputable that defendant, having actual possession, "had a valid title against all the world, except the true owner. . . . If any other person had entered on the land, he might have maintained trespass against him, or if he had been ousted, he might have maintained a writ of entry." It was considered whether, defendant's possession not amounting to a disseisin, he was ever actually seised, so that title could pass to his grantees and a covenant of warranty could run with the land and pass to their assignees. As to the remark of Parsons, C. J., in *Langdon v. Potter*, 3 Mass. 219: "Although there may be a concurrent possession, there cannot be a concurrent seisin of lands," the court said: "However this may be, according to the doctrine of the ancient feudal law, it is not supported by modern decisions, and is not applicable to our tenures, except in a qualified and

tions was simply to bar the remedy of the owner, it seems that in the *United States* at least, adverse possession for the period of the statute, not only bars the remedy of the owner, but operates to transfer a complete title to the adverse holder.¹

limited sense. It is true that two adverse parties cannot both be seised of the same land at the same time. But if A enters on the land of B, without ousting him, or doing some act equivalent to an ouster, he will not thereby acquire a seisin as against B, unless B elects to consider himself disseised; but A's possession would constitute a legal seisin against any one who might enter upon him and oust him without right; and he might maintain a writ of entry against the wrongdoer, declaring on his own seisin, and a disseisin by the tenant." The court held that there is no legal difference between seisin and possession; although there is a difference between disseisin and dis-possession; the former meaning an estate gained by wrong and injury, whereas the latter may be by right or by wrong; the former denoting an ouster of the disseisee, or some act equivalent to it, whereas by the latter no such act is implied. Co. Litt. 153 b, 181 a; 1 Bur. 108, 111; Matheson v. Trot, 1 Leon 209; Smith v. Burtis, 6 Johns. (N. Y.) 217; 5 Am. Dec. 218. Lord Coke says, seisin signifies, in the common law, possession. Co. Litt. 153 a. Seisin, according to Com. Dig. Seisin, a, 1, imports the having possession of an estate of freehold or inheritance in lands or tenements. See Smith v. Burtis, 6 Johns. (N. Y.) 206; 5 Am. Dec. 218, and cases there cited. The court then found that defendant had a good right to convey title, whatever it was, if he was in possession, without regard to distinction between seisin and possession, *citing*, as sustaining this principle, the case of Bearce v. Jackson, 4 Mass. 408, where the court said: "It is very clear that the defendant's intestate, being in possession, claiming a fee simple in the land, was able to convey." In this latter case it was also decided that such a possession and claim constitutes a legal seisin. This decision is, in Slater v. Rawson, 6 Met. (Mass.) 439, considered to be in conformity with the construction which holds that the covenants of seisin and of right to convey are synonymous, because the same fact, viz., the seisin of the grantor, will support both covenants.

1. See LIMITATION OF ACTIONS, vol. 13, pp. 693-694, where is quoted the distinction drawn in Jones v. Jones, 18 Ala. 248, between the operation of the Statute of Limitations on title as vesting it; and in contract where the remedy alone is affected in the debt itself. This distinction was approved in Campbell v. Holt, 115 U. S. 620, where it is said by the court, through Miller, J., "The weight of authority is in favor of the proposition that, where one has had peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. The doctrine has been repeatedly asserted in this court. Lef-fingwell v. Warren, 2 Black (U. S.) 599; Croxall v. Shererd, 5 Wall. (U. S.) 289; Dickerson v. Colgrove, 100 U. S. 583; Bicknell v. Comstock, 113 U. S. 152. It is the doctrine of the English courts, and has been often asserted in the highest courts of the states of the Union." This was said in regard to the distinction between the effect of the Statute of Limitations on contract as merely taking away the remedy, and its effect on real property, where it vests the title.

See the extensive list of cases cited in LIMITATION OF ACTIONS, vol. 13, p. 694. See also Boswell Lim. of Adverse Possession, par. 229, and the notes. See Rhode Island Pub. Stat., ch. 175, § 2, considered in Union Sav. Bank v. Taber, 13 R. I. 683; Smith v. Lorillard, 10 Johns. (N. Y.) 357; 3 Washb. Real Prop. *449.

The writ of right lay only for the recovery of an estate in fee simple, and was the last resort of the party who had been ousted of real property. In Derby v. Jacques, 1 Cliff. (U. S.) 425, in an action on a writ of right, it was held that this remedy still exists at common law, though abolished in the courts of Massachusetts in 1840 by Massachusetts Rev. Sts., ch. 101, § 51; but that in accordance with the decision in Homer v. Brown, 16 How.

b. POSSESSION—(1) *How Far Does Possession Give a Right.*—Possession in itself (as distinct from the “right of possession”), may be said to give a right protected by the law only in a modified and inaccurate sense, chiefly in such instances as in the action of forcible entry and detainer,¹ and where mere possession with color or claim of title is said to support ejectment and trespass.² But in the former instance, it appears clearly from the cases that

(U. S.) 363, this statute did not abolish a writ of right as process in the *United States* circuit court in the *Massachusetts* district. But, in accordance with the same decision, it was held that it was as process alone that the action continued in the circuit court for that district, and that the action was subject to the limitation prescribed by the state law as to the time within which such remedy might be prosecuted. This was in accordance with the 34th section of the Judiciary Act that the laws of the several states shall be regarded as rules of decision in the courts of the *United States* where they apply. “While, therefore,” the court said, “a writ of right may still be maintained in the circuit court of this district, the common-law rule that a final judgment in a writ of entry is not a bar to such a suit, is no longer here in force. . . . To regard the writ of right in the circuit court of the district as still overriding a final judgment recovered on a writ of entry in the state court, would present the anomaly of one rule of property in the state courts, and another and a different rule in the circuit court in respect to the same subject-matter.” See also *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Green v. Kellum*, 23 Pa. St. 254; 62 Am. Dec. 332, note; *Schall v. Williams Valley R. Co.*, 35 Pa. St. 205 and cases there cited, and *Fisher v. Philadelphia*, 75 Pa. St. 392.

1. See *FORCIBLE ENTRY AND DETAINER*, vol. 8, p. 119, where it is said that the question involved in the action is the fact of possession only, and not the right to possession. “The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title or right of possession cannot arise. A forcible entry upon the actual possessions of plaintiff being proven, he would be entitled to resti-

tution, though the fee simple, title, and present right of possession, are shown to be in the defendant. The authorities on this point are numerous and uniform.” *McCauley v. Weller*, 12 Cal. 500. See also *Jenkins v. Tynon*, 1 Colo. App. 133; *Potts v. Magnes*, 17 Colo. 364; *Stillman v. Palis*, 134 Ill. 532; *Hill v. Olin*, 82 Mich. 643; *Craig v. Donnelly*, 28 Mo. App. 342; *Pettit v. Black*, 13 Neb. 142; *Lipp v. Hunt*, 25 Neb. 91; *Logan v. Lee*, 53 Ark. 94; *Gooch v. Hollan*, 30 Mo. App. 450; *Pederson v. Cline*, 27 Ill. App. 249; *Mosseller v. Deaver*, 106 N. Car. 494; *Cain v. Flood* (C. Pl.), 14 N. Y. Supp. 776.

2. Mere possession, with color or claim of title, is sufficient to maintain ejectment (as well as trespass) against one who subsequently entered. See *Woods v. Banks*, 14 N. H. 101. This proposition, it is clear, rests entirely upon the doctrine of presumptions. In the case just cited where it is announced, the court says: “The plaintiff’s possession is *prima facie* evidence of title. There is nothing . . . to rebut it. The defendants show no pretense of title under which to justify their subsequent entry. . . . A possession of the plaintiff then and the evidence of title which it furnishes stands wholly unimpeached and entitles him to an action of trespass to recover damages for an injury done to the possession.” This ground is taken even in the older books, as when Blackstone, describing mere possession, says: “Actual possession is *prima facie* evidence of a complete legal title in the possessor.” 2 Blackstone’s Com. 196. See 2 Min. Inst. 447.

It has been maintained in many states, notably in *Massachusetts*, that actual possession is evidence of title against a stranger having no title, a proposition of the law of evidence, which is equally true of personal as of real property. See *Buswell on Lim. & Adverse Possession*, §§ 2, 29. Thus in *Taber v. Lawrence*, 134 Mass. 94, it was held that in trover, possession of

the exclusive and direct object of the law is, not to protect possession, but to prevent disturbance of the public peace;¹ in the latter class of cases, the word "title" is used merely in a relative sense. The whole question is not that of absolute right in any one party, but of the relative strength of presumptions by a rule of evidence which is equally true for a similar purpose in the law of personal property.²

A third case where possession is said to give a right, may seem to exist where it is said that trover and replevin will not lie for goods against one in the actual possession of land from which they were taken; but this is easily seen to be a mere question of procedure.³

the goods under a claim of title is sufficient evidence of property as against one who shows no better right. See *Greenl. on Ev.*, par. 67. So in *Putnam v. Lewis*, 133 Mass. 269, in an action for conversion, a previous decision of the court was sustained that a possession under a claim of right is sufficient title against one who has no right. See *Burke v. Savage*, 13 Allen (Mass.) 408.

Among the cases treating possession as evidence of ownership, cases which are almost innumerable, may be cited, viz.: *Parker v. Birkbeck*, 3 Burr. 1556; *Jackson v. Harder*, 4 Johns. (N. Y.) 202; 4 Am. Dec. 262; *Jackson v. Hazen*, 2 Johns. (N. Y.) 22; *Lund v. Parker*, 3 N. H. 50; *Hubbard v. Little*, 9 Cush. (Mass.) 475; *Slater v. Rawson*, 6 Met. (Mass.) 439; *Pettingell v. Boynton*, 139 Mass. 344. See also *Cutts v. Spring*, 15 Mass. 134; *Cook v. Rider*, 16 Pick. (Mass.) 186; *Spurr v. Bartholomew*, 2 Met. (Mass.) 479; *Hubbard v. Little*, 9 Cush. (Mass.) 475; *Ricard v. Williams*, 7 Wheat. (U. S.) 59; *Hodgdon v. Shannon*, 44 N. H. 572, with the cases there cited. See also the American note under the leading cases of *Nepean v. Doe*, and *Taylor v. Horde*, 1 Sm. L. Cas. *774. See *PRESUMPTIONS*, vol. 19, p. 53, where a list of cases will be found; *ADVERSE POSSESSION*, vol. 1, p. 363, with cases fully cited and stated. See also *Jackson v. Town*, 4 Cow. (N. Y.) 599; 15 Am. Dec. 405; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213; 21 Am. Dec. 306, and finally, *Stephen on Pl.* (3d. Am. ed.) 286, 287. From all these cases it appears that the use of the word "title" is a relative one; that the question is not that of absolute ownership in one party, but of the relative strength of the evidence between the two parties.

1. See the first note of this section.

2. See the second note of this section.

3. The principal cases which lay down the rule are *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663; *Brown v. Caldwell*, 10 S. & R. (Pa.) 114; 13 Am. Dec. 660; *Elliott v. Powell*, 10 Watts (Pa.) 454; 36 Am. Dec. 200; *Harlan v. Harlan*, 15 Pa. St. 509; 53 Am. Dec. 612, *citing* among others, *Heath v. Ross*, 12 Johns. (N. Y.) 140; *Higginson v. York*, 5 Mass. 345; *Clair v. Roberts*, Wm. Jones, 243. See also *Farrand v. Thompson*, 5 B. & Ald. 272; *Mooers v. Wait*, 3 Wend. (N. Y.) 104; 20 Am. Dec. 667.

It is clearly shown by *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612, that the possession must be not only actual, but adverse, claiming title, the court saying: "The mere assertion of a title would be nothing. The court looks to the substance, and where it appears that in truth it is a trial of title, then it is properly ruled that replevin is not the proper action, but that it must be tried in another form. Beyond, the cases do not go, nor does public policy require they should."

In *Martin v. Thompson*, 62 Cal. 618; 45 Am. Rep. 663, the court reviewed and distinguished the principal cases, sustaining the distinction drawn in *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612, *quoting* as follows from *Halleck v. Mixer*, 16 Cal. 574: "If the complaint alleged the title, it would . . . be demurrable; if it merely alleged ownership of the property, the party would be excluded on trial from the proof of his title. . . . The true rule is this: The plaintiff out of possession cannot sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely

(2) *Possession as Evidence of Title*—(a) *Generally*.—A conclusive reason against the treatment of possession as giving incomplete right of ownership is that it can have no fixed character as such. As a foundation for ownership, possession can be accompanied by a variety of circumstances, presenting a whole, which, as evidence of title, must frequently be determined by a jury. These circumstances may be grouped in a general way; as, First: The facts immediately surrounding the possession, such as permission of the owner, or facts showing claim or color of title, viewed in themselves. Second: The relative strength of such facts when opposed to each other. Third: The nature of the action and the relative position of the parties, whether of attack or defense.

The result of the decisions can be most clearly seen in the progressive enumeration, necessarily imperfect, of classes of cases in which the effect of possession as evidence of ownership varies according to the nature of the accompanying facts, the enumeration proceeding from the simplest case to that which will constitute a complete title against all the world.

It may be stated as a cardinal rule, that as between two parties, possession will never prevail unless it be exclusive.¹

(b) *Bare Possession*.—Bare possession is sufficient evidence as

in good faith under claim and color of title. In other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is . . . upon such proof that the right of recovery rests. . . . A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action." See *Atherton v. Fowler*, 96 U. S. 513.

1. The indispensable requisite for acquiring title by possession as against the true or previous owner, is that the occupant claim ownership as against such real or previous owner, whether by denying, impugning, or openly defying such ownership. Permissive occupancy can never mature to a complete title. Typical cases of such permissive occupancy are so-called squatter claims. Such a case was *Sackett v. McDonnell*, 8 Biss. (U. S.) 394, which arose under *Illinois Rev. Sts.*, ch. 83, § 1, where the court said: "The Statute of Limitations invoked in this case does not give a person title who merely enters upon another man's land and remains there twenty years, unless he claims the right of entry by virtue of his own title, so as to give the owner an oppor-

tunity of trying titles with him. Thus, if a mere squatter . . . (that is, a person who enters without color of right) enters upon your land, claiming no title as against you, but simply moves on to the land on the assumption that you have no immediate use for it, and without impugning your title, and you acquiesce in his remaining there—do not drive him off, or sue him in ejectment or trespass—he gets no title as against you by such permissive occupation." See also *Kerr v. Hitt*, 75 Ill. 51; *Grim v. Murphy*, 110 Ill. 274; *McClellan v. Kellogg*, 17 Ill. 498; *Jackson v. Berner*, 48 Ill. 203. But it must be noticed that while such occupant cannot acquire title as against the true owner, such occupancy will be sufficient evidence as against one having a lesser right (such as a wrongdoer) to bring ejectment or trespass. See the notes immediately following, under the first of the typical cases stated in the notes.

This is, of course, distinct from acquiescence of the owner in the possession of another, as raising the presumption of grant. See *PRESUMPTIONS*, vol. 19, p. 81; *LIMITATION OF ACTIONS*, vol. 13, p. 694, n. 2; *Washb. on Real Prop.* *35; *Hall v. Stevens*, 9 Met. (Mass.) 418; *Clarke v. McClure*, 10 Gratt. (Va.) 305.

against every one who can show no better evidence.¹ Thus, a tenant at will may maintain trespass or writ of entry against a stranger;² and so may a tortfeasor, even though his tortious possession does not amount to a disseisin of the true owner.³ In both cases a constructive possession remains in the true owner; for a person may have a possession which is legal and valid against

1. See Greenl. on Ev., § 44. In *Lund v. Parker*, 3 N. H. 50, Richardson, C. J., said: "There is no doubt that possession of land without title or color of title is sufficient evidence of the seisin in the possessor to entitle him to hold the land against every person who can show no better evidence of title." In *Newhall v. Wheeler*, 7 Mass. 189, it was held that actual possession is *prima facie* evidence of a legal seisin. See 2 Bl. Com. 196.

2. In *Slater v. Rawson*, 6 Met. (Mass.) 445, Wilde, J., said: "A tenant at will may maintain trespass against a stranger, although his possession is the constructive possession of his lessor. In an action of trespass *quare clausum fregit*, the defendant can never plead soil and freehold in a third person, without alleging a license from him; because a party, having actual possession, but not the right of possession, has a good title against a party having none." See the next note.

3. In the case last mentioned, *Slater v. Rawson*, 6 Met. (Mass.) 438, a case which seems to be a controlling one in *Massachusetts*, on certain aspects of possession, the question was, whether one who had had actual possession of the premises and had sold timber therefrom for a number of years, was seised of the land, for the purpose of liability to an action on a covenant of warranty by his grantees. The objection was raised that as the defendant's possession did not amount to a disseisin, he never had legal possession, and that the constructive possession continued in the true owner. This was admitted to be true as between defendant and the true owner. "But" it was said, "the tortfeasor may, nevertheless, well maintain an action of trespass or a writ of entry against a stranger without title, for a trespass or a disturbance of his actual possession; and the defendant in such an action cannot defend on the ground that the plaintiff's possession was the possession of the true owner. A party may have a possession which is legal and valid against one party, and not

against another. . . . In an action of trespass *quare clausum fregit*, the defendant can never plead soil and freehold in a third person without alleging a license from him, because a party having actual possession, but not the right of possession, has a good title against the party having none." The court cited on this point *Harker v. Birkbeck*, 3 Burr. 1556; *Jackson v. Harder*, 4 Johns. (N. Y.) 202; 4 Am. Dec. 262, where it was held that a person having had possession of land for eight or ten years was entitled to recover possession against a mere intruder. *Jackson v. Hazen*, 2 Johns. (N. Y.) 22, a stronger case; and *Lund v. Parker*, 3 N. H. 50. As directly supporting this principle were further cited *Cutts v. Spring*, 15 Mass. 134; *Cook v. Rider*, 16 Pick. (Mass.) 186; *Spurr v. Bartholomew*, 2 Met. (Mass.) 479; *Jackson v. Worcester R. Co.*, in 1838 or 1839, not reported.

In *Hubbard v. Little*, 9 Cush. (Mass.) 475, it was held that the demandant in a writ of entry, who shows a possession prior in time, is entitled to recover against a tenant who shows no title to the premises, but merely possession at the time of suit brought; although such demandant may be a wrongdoer as to the real owner. The court said: "The force and effect of a mere possessory title, as against the person who ousts the party originally in possession, is fully explained and elucidated in *Slater v. Rawson*, 6 Met. (Mass.) 439. It is there laid down that, if A enter on land of B and oust him, A's possession, thus acquired, would constitute legal seisin against any one who might enter upon and oust him without right; and A might well maintain a writ of entry against the wrongdoer, declaring on his own seisin and a disseisin by the tenant. Actual possession of land gives a good title against a stranger having no title. Nor does this violate the well-established rule, that a party is to recover upon the strength of his own title only. A possession, prior in point of time to that of the tenant who has himself no

one and not against another.¹ This is sometimes stated in the brief form: every possession is good against a wrongdoer.²

(e) **Prior Possession.**—Mere prior possession will support ejectment.³ In some states this is provided by statute.

title, but only a subsequent possession acquired by an ouster of the demandant, is a better title, upon the strength of which a party is entitled to recover. It is a case where the maxim, *prior in tempore potior iure*, is applicable."

It will be noticed that the court, in citing the supposititious case mentioned in *Slater v. Rawson*, 6 Met. (Mass.) 439, by an evident oversight, misapprehends the original statement in an important particular, losing much of its force for the principle under discussion. The actual words of the court, by Wilde, J., were: " . . . if A enters on the land of B, *without ousting him* . . ."

In *Litchfield v. Scituate*, 136 Mass. 39, it is held that the demandant in a writ of entry against a tenant who has no title, may rely upon the possession, and need not show title by grant or disseisin of the true owner.

In *Pettingell v. Boynton*, 139 Mass. 244, at the trial of a writ of entry to recover possession of an island, it appeared that the demandant and his ancestor had sold sand and driftwood for more than twenty years from the island; that they had made leases of cottage rights and had conveyed one parcel in fee. The court said: "Whether the acts done by the demandant were such as would oust the true owner, or whether, if of such a character, they had been continued for more than twenty years consecutively or not, they were certainly sufficient to create a possessory title which was good against a mere intruder, without pretense of title. . . . There may be a possessory title, the holder of which may be treated by the true owner as a tort-feasor, which will avail such holder in maintaining an action of trespass or a writ of entry, against a stranger for a disturbance of his own possession." See also *Provident Sav. Inst. v. Burnham*, 128 Mass. 458. The same principle was sustained in the later cases of *Gibbs v. Childs*, 143 Mass. 103; *Litchfield v. Scituate*, 136 Mass. 39; *Litchfield v. Ferguson*, 141 Mass. 97, where it was held that one being in possession, even if it is not such as would amount to a disseisin of the true owner, may maintain trespass against a mere intruder without right upon that possession, and

if he is ousted by such intruder, may maintain a writ of entry against him.

But where one had exercised no other rights of ownership over an open beach, except by going on and taking the driftwood for a number of years without forbidding others to exercise the same right, such temporary and occasional occupation was held insufficient to support an action of tort for breaking and entering the plaintiff's close. The case was held to come within the principle that where two parties have a concurrent or mixed possession of land, neither having title or exclusive priority of possession, one of them cannot maintain an action of trespass against the other. See *Brimmer v. Proprietors of Long Wharf*, 5 Pick. (Mass.) 131; *Barnstable v. Thacher*, 3 Met. (Mass.) 237.

1. See the two preceding notes, and *supra*, this title, *Elements or "Stages" of Title—In General*, where the subject of constructive possession is discussed.

2. See **EJECTMENT**, vol. 6, p. 227, and cases cited.

3. In *Smith v. Lorillard*, 10 Johns. (N. Y.) 355, Kent, C. J., clearly states the reason on which the doctrine is based. "That the first possession," he says, "should, in such cases, be the better evidence of right, seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right every possessor of land has, in the first instance, and after a continued possession for twenty years, under pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry." See also *Christy v. Scott*, 14 How. (U. S.) 283.

In *Crockett v. Morrison*, 11 Mo. 1, the court said: "As the action for ejectment is a possessory action, where no title appears on either side, a prior possession, though short of twenty years, will prevail over a subsequent possession which has not ripened into a title, provided the prior possession be under a claim of right and not voluntarily abandoned." So in *Dale v.*

(d) **Prior Possession as Against "Color of Title."**—Prior possession under claim of right will prevail against possession under color of title derived by deed from a grantor who entered subsequently.¹

(e) **"Outstanding Title" in Ejectment.**—In ejectment, the defendant may not invoke the outstanding title of the true owner, where such title neither strengthens his own title, nor impeaches that of the plaintiff as proved by him.²

Faivre, 43 Mo. 556, it was declared that it was well settled, that prior possession accompanied by a claim of the fee, raises a presumption of title, and is sufficient to support the right to eject him who has only the naked possession, and that the grantee of the person so holding prior possession, succeeds to his rights. See also *Hubbard v. Little*, 9 Cush. (Mass.) 475; and, generally, the cases mentioned in the last note.

By *Georgia Code* (1882), section 3014, bare possession will support ejectment; by section 3366, prior possession against one subsequently acquiring possession. *Parker v. Waycross, etc.*, R. Co., 81 Ga. 387; citing *Eaton v. Freeman*, 63 Ga. 538; *Clark v. Hulsey*, 54 Ga. 610; *Jones v. Easley*, 53 Ga. 454; *Jones v. Scoggins*, 11 Ga. 119; *Doc v. Lancaster*, 5 Ga. 39.

See **EJECTMENT**, vol. 6, p. 203, where the statutory requirements are generally stated.

Under *New York Code*, section 449, actual possession of land for three years will support an action by the holder to compel the defendant to show his title. But in *Ford v. Belmont*, 69 N. Y. 567, it was held that where for a period of several years before the entry by the plaintiff under an unfounded claim, the premises had been in the actual possession of the defendants (by their agent), such prior possession was a sufficient answer to the claim of an intruder.

1. In *Perry v. Weeks*, 137 Mass. 584, the demandant, in the writ of entry, rested his case upon a warranty deed executed and recorded without any other evidence that the grantors had any title to the premises. It was held that the demandant's claim could not prevail against a possession under a claim of right. See *Bearce v. Jackson*, 4 Mass. 408; *Slater v. Rawson*, 6 Met. (Mass.) 439. The court adding that a grantor not shown to have any title to land, may not, by making a warranty deed, enable his grantee to render unavailable a possession sufficient to give title against the rest of the world, how-

ever insufficient against the true owner. See *Ward v. Fuller*, 15 Pick. (Mass.) 185; *Williston v. Morse*, 10 Met. (Mass.) 17. See the note and cases under the next rule.

2. **Doctrine that Defendant May Always Defeat Plaintiff by Proving a Better Outstanding Title.**—It is frequently stated in decisions, notably those of federal courts, as a rule in ejectment, that the plaintiff must recover, if at all, upon the strength of his own title; the weakness of his adversary's title cannot avail him. As corollary to this, it is commonly said to be a principle that the defendant is always at liberty to prove the title out of the plaintiff, although he do not prove it to exist in himself. The first rule is undoubtedly true, if taken in the strict sense that as between the two claims the plaintiff must show his own to be the stronger; that he cannot recover by merely proving that the defendant has possession without title. As to the second principle, it is, also, undoubtedly true that the defendant may invoke an outstanding title where such title negatives that of the plaintiff as alleged by him; and likewise where such outstanding title is connected with the defendant's title, making the latter superior to that of the plaintiff. But in its broad and unlimited meaning, the doctrine must be denied in so far as it allows a defendant to set up an outstanding title which in no way impeaches that of the plaintiff, nor strengthens his own. A close examination of the cases by which this principle is supposed to be established, will show that there is hardly a single decision resting upon it exclusively, which allows the defendant to retain possession. In many cases, the doctrine is put forth as a *dictum* or as an alternative ground of the decision. In others, it is said to be "qualified by the case in which it arises." In the latest decisions, it is clearly rejected, and the question in ejectment is narrowed to that of the highest evidence of the title between the two parties.

In *Turner v. Aldridge*, 1 McAll. (U. S.) 229, this principle is construed. Numerous *California* cases are cited where the strict construction is not sustained. These are: *Ladd v. Stevenson*, 1 Cal. 18; *Brown v. O'Connor*, 1 Cal. 421; *Hutchinson v. Perley*, 4 Cal. 53; 60 Am. Dec. 578; *Hicks v. Davis*, 4 Cal. 67; *Winans v. Christy*, 4 Cal. 70; 6 Am. Dec. 597; *Bequette v. Caulfield*, 4 Cal. 278; 60 Am. Dec. 615. In these cases it was held that prior peaceable possession of the plaintiff is sufficient, however defective his title; that possession coupled with color of title must prevail, except where a better title is shown in the defendant. The court concludes that the general rule as stated, enables a mere trespasser to maintain his possession, if he can discover defects in any of the links of the chain of testimony which establishes the title of the plaintiff whom he has disseised, and holds that such a case constitutes an exception, relying chiefly upon *Christy v. Scott*, 14 How. (U. S.) 282, in which this exception was first announced.

In *Bragg v. Lorio*, 1 Woods (U. S.) 209, the second principle was maintained without any citation, but it is not necessary to the decision, being an alternative ground. In *Doswell v. De La Lanza*, 20 How. (U. S.) 29, the second doctrine was put forth without any supporting cases, but the court expressly refused to decide on that ground. In *McNitt v. Turner*, 16 Wall. (U. S.) 352, the first principle is applied to test the plaintiff's title as set forth by him. The second principle is neither mentioned nor applied. In *Love v. Simms*, 9 Wheat. (U. S.) 515, it was said: "The rule of law, that a plaintiff must recover by the strength of his own title, and not the weakness of his adversary's, must be limited and explained by the nature of each case as it arises. Since the rule is universal that the plaintiff in ejectment must show the right to possession to be in himself positively, and it is immaterial as to his right of recovery, whether it be out of the tenant or not, if it be not in himself, it follows that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. Possible difficulties may be suggested as to the application of this principle to mere tort-feasors or forcible disseisors; but besides that, such cases, being generally provided

for under statutes of forcible entry, must be of rare occurrence, it is time enough, when they occur, to consider what exceptions they present to the general principle." In the case under review, it is clear that the defendant could justly invoke the outstanding title against the plaintiff, since its effect was to destroy one of the links of the chain of title under which the plaintiff held. The court seems to overlook the distinction between an outstanding title unconnected with that of the defendant which may have such an effect, and one which does not disturb the title of the plaintiff as set forth by him.

In *McFarland v. Goodman*, 6 Biss. (U. S.) 111, the first principle as stated does not include the second. In *Sykes v. Hayes*, 5 Biss. (U. S.) 529, it was held that the admission by the defendant of plaintiff's ownership, was sufficient evidence of title in the plaintiff to sustain an action, so long as the defendant set up no title and showed no ownership in himself. And in *Aurora Hill Con. Min. Co. v. 85 Mining Co.*, 34 Fed. Rep. 515, in an action of ejectment for recovery of possession of a mining claim, it was said in the opinion to be a general rule that, "Any person vested with the right of immediate possession to realty, may maintain ejectment." Section 910 of the U. S. Rev. Sts., which provides that, "No possessory action between persons in any court of the *United States* for the recovery of any mining title or for damages . . . shall be affected by the fact that the paramount title to the land in which such mines lie, is in the *United States*; but each case shall be adjudged by the law of possession," was held to apply.

The most recent of the cases on this question is clearly in favor of the limitation of the principle here submitted. *Wilson v. Fine*, 38 Fed. Rep. 789, was an action brought in a *United States* district court to recover possession of land claimed by certificate under the homestead law, an action provided by *Oregon Comp. Laws* 1887, § 316, and held in this case to be "substantially the common-law action of ejectment." The complaint set forth unlawful ejectment of the plaintiff, being the "owner in fee simple," by conveyance from one to whom the premises were "duly certified by final certificate . . . by the proper officers of the land department of the

United States, under the Homestead Laws of the same." To this complaint, the defendant demurred for the reason that it "does not state facts sufficient to constitute a cause of action." As the opinion of the court was a thorough review of the cases on the subject in the *United States* courts, some of which have been mentioned above, it is here quoted to a large extent: "On the argument the only point made in support of the demurrer was that it appears from the complaint the plaintiff has not the legal title to the premises, the same being presumably in the *United States*, and therefore cannot maintain this action to recover possession of the same; citing *Langdon v. Sherwood*, 124 U. S. 74, and cases there referred to. In reply, counsel for the plaintiff contends that an action to recover the possession of real property may be maintained on a prior possession against a mere intruder or trespasser, such as the defendant appears to be; citing *Christy v. Scott*, 14 How. (U. S.) 282, and cases there referred to. In the case cited by counsel for the demurrer, the plaintiff sought to maintain ejectment for certain lands in *Nebraska* as the mere assignee of a certificate of purchase of the same, issued by the local land-officers at Omaha. It does not appear that he had ever been in the possession of the premises, or been disseised thereof. By the law of *Nebraska*, such certificate is made equivalent to a patent as proof of title against any one but the holder of the patent. But, notwithstanding this, the court held that ejectment cannot be maintained in the courts of the *United States* for the possession of lands in that state or elsewhere on such evidence. In support of this conclusion the court cited *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Fenn v. Holme*, 21 How. (U. S.) 481; *Hooper v. Scheimer*, 23 How. (U. S.) 235; and *Foster v. Mora*, 98 U. S. 425. In *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, the court held that the holder of a patent from the *United States* could maintain ejectment in the courts of the *United States* against an occupant claiming under such location. The effect of this decision is simply that, in ejectment, the party having the highest evidence of the legal title must prevail; that the patent of the *United States*, as evidence of title, was superior to that of location; and upon this point there can be but one opinion. . . .

Fenn v. Holme, 21 How. (U. S.) 481, was an action brought on a New Madrid location, which had neither been surveyed nor approved. *Hooper v. Scheimer*, 23 How. (U. S.) 235, was an action brought on an entry with the register and receiver to recover possession of certain lots in Little Rock, Ark., which the state had declared was sufficient evidence of title to support ejectment. The defendant claimed under a patent from the *United States*, which, appearing valid on its face, the court held could not be contradicted or overcome by evidence *alunde*, and must therefore prevail against the certificate of purchase. In delivering the opinion of the court in the latter case, Mr. Justice Catron said that ejectment cannot be maintained in the national courts against 'a defendant in possession' on an entry made with a register and receiver; and Mr. Justice Daniel said in *Fenn v. Holme*, 21 How. (U. S.) 481, without qualification, that the plaintiff in ejectment cannot recover in ejectment without the legal title—the complete title. He seems to have labored under the impression that to allow the action to be maintained without such title would in some way destroy the distinction between actions at law and suits in equity, contrary to the constitution and laws of the *United States*. But in this he was certainly mistaken. *Foster v. Mora*, 98 U. S. 425, was an action brought by a person claiming title to the Mission San Juan Capistrano under a patent from the *United States*, to recover possession of the same from parties who claimed under a confirmed Mexican grant, on which a patent had not been issued. The court simply held that the legal title, as evidenced by the patent, must prevail, and, if there were any equities in the case, they could only be considered on the equity side of the court. Now, there is neither decision nor dictum, unless it be that of Mr. Justice Daniel, in any of these cases against the right to maintain ejectment in any common-law court, state or national, on a prior possession, against a mere intruder or trespasser, whether such possession is claimed or held in pursuance of a purchase from the *United States*, on which a patent has not yet issued, or otherwise. Nor can I see (and I say it with due deference), if a state provides that ejectment—an action at law to recover the possession of real property wrong-

(f) "Outstanding Title" of the Government.—In ejectment supported by possession with claim of fee for the statutory period, the defendant may not invoke the outstanding title of the government.¹

fully withheld from the plaintiff therein—may be maintained on any evidence of title to or interest in the premises from mere prior possession, to a patent under the seal of the *United States*, which shows a present right in the plaintiff to the possession, as against the defendant, how the character of the action is thereby changed, or confounded or blended with a suit in equity. An action at law is the acknowledged remedy for the recovery of the possession of real property wrongfully withheld from the plaintiff, or to recover damages for a trespass thereon; while a suit in equity is the proper remedy to compel a conveyance thereof, when wrongfully refused, or to establish or enforce a trust therein. If the legislature provides that the former may be maintained on any interest in the premises or right thereto short of the strict legal title, from which it appears that the plaintiff is legally entitled to the possession, as against the defendant, it is none the less an action at law, and in no sense a suit in equity. . . . The question in this case is simply this: Can ejectment be maintained in this court on a prior possession against an intruder or trespasser?" The court then cites the *Oregon* statute aforesaid, as the rule of procedure by virtue of U. S. Rev. Stat., § 914, and quotes from *Whitney v. Wright*, 15 Wend. (N. Y.) 179. "A prior possession is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrongdoer, or a person subsequently entering without a lawful right" . . . also from *Jackson v. Boston*, etc., R. Corp., 1 Cush. (Mass.) 575: "If A enters on the land of B and takes possession, and afterward C enters on A and dispossesses him, A may well maintain an action against C to recover possession, although his entry on B was without right, and tortious; for mere possession is a good title against a stranger having no title;" and finally from *Christy v. Scott*, 14 How. (U. S.) 282, as to the right of one having actual prior possession of land to recover it in ejectment from a mere trespasser setting up an outstanding title in another; and concluded: "The plaintiff

is the beneficial owner of the property, and was in possession of the same when the defendant entered without title or right. Such possession is sufficient, according to the rules of the common law and the statute of this state governing the procedure in this court, to enable the plaintiff to maintain this action. . . ." Citing also 2 Bl. Com. 195; *Fields v. Squires*, 1 Deady (U. S.) 388; 2 Washb. Real Prop. 493. See *Childers v. Calloway*, 76 Ala. 128, citing *Wilson v. Glenn*, 68 Ala. 383.

1. This proposition is controlled by the same reasons as the one stated above, of which it is in fact, a corollary; the same cases therefore apply to it as there cited.

In *Davis v. Thompson*, 56 Mo. 39, it was said: "When the plaintiff, as in this case, showed a possession in his grantors extending back more than thirty years, accompanied with a claim of right, it made out in him a title which warranted a recovery, unless defeated by a better title set up by the defendant. And from the lapse of time during which the land had been occupied and possessed, it might well be presumed, as against everybody except the government, that a patent had actually issued. But the government is not here defending or making any claim to the land, and the defendant will not be permitted to interpose a defense in its behalf." See also *Christy v. Scott*, 14 How. (U. S.) 283.

A like decision was given in a like case in *Barry v. Otto*, 56 Mo. 177. See also *Crockett v. Morrison*, 11 Mo. 1; *Dale v. Faivre*, 43 Mo. 556; *Farrar v. Heinrich*, 86 Mo. 521; and *Fulkerson v. Mitchell*, 82 Mo. 13.

Origin of the Doctrine that Defendant in Ejectment May Defeat Plaintiff by Exhibiting an Outstanding Title.—The origin of the doctrine may possibly be derived from a conception of the rule in the trial of title on a writ of right, that the tenant can set up title and seisin in a stranger, to disprove the seisin of the demandant. But it is clearly shown in *Green v. Watkins*, 7 Wheat. (U. S.) 28, by Story, J., to be the ground of this rule, that since the *mise* involves the title of both parties,

and institutes a comparison between them, it is the right of each party to give any fact in evidence which destroys the title of the other; "for the question in controversy is, which hath the better mere right to hold the demanded premises;" that since seisin, in deed or by construction of law, is indispensable to enable the demandant to maintain his suit, "the tenant may thus defeat the demandant, by proving that he never had any such seisin in deed, or if he once had it, that he has parted with his whole estate, . . . It follows, therefore . . . that the tenant may disprove the demandant's seisin in deed or by any evidence competent for this purpose; and if he succeeds in establishing the fact, the demandant must fail in his suit." In considering the broad question: "Can the defendant defend himself by an older and better existing title than the demandant's in a third person?" the court in distinguishing the decision in *Green v. Lister*, 8 Cranch (U. S.) 229, said: "It is material to consider, that this question does not purport to inquire whether the tenant may disprove the defendant's seisin in the writ of right; nor does it purport to inquire whether the tenant may not show that the demandant has no title, or a title defective in point of legal operation. It supposes that the demandant has a title *per se*, sufficient for a recovery, and then asks if a better title may be shown in a third person to defeat such recovery. The answer of the court is in the following words: 'We are of opinion that a better subsisting adverse title in a third person is no defense in a writ of right; that writ brings into controversy only the mere rights of the parties to the suit.' It is most manifest, that in this answer the court proceed upon the supposition that the demandant has *prima facie*, a good title, upon which he may maintain his suit; and that he has established a seisin sufficient, in point of law, to entitle him to a recovery. And the point then is, whether a superior adverse title and seisin in a stranger can be given in evidence to dispute such recovery. . . . It cannot be admitted, because a writ of right does not bring into controversy the right of the demandant as against all the world, but the mere right of the parties to the suit. But it does bring into controversy the mere right between these parties; and if so, it, by consequence,

authorizes either party to establish, by evidence, that the other has no right whatsoever in the demanded premises, or that his mere right is inferior to that set up against him." It is obvious that if in the old *droitural* action, the whole question is a comparison of the titles of the two parties and a determination of which is the better of them, this is *à fortiori* true in a possessory action like ejectment, where the abstract title is not in question.

Doctrine that Ejectment Must Be Supported by the Strict Legal Title.—A similar doctrine to the preceding one, resting, it seems, also on a misconception, has prevailed to some extent in the federal courts. It is that ejectment may be maintained in the *United States* courts only on a strict legal title. This is put forth in *Fenn v. Holme*, 21 How. (U. S.) 481; *Foster v. Mora*, 98 U. S. 425; *Shierburn v. De Cordova*, 24 How. (U. S.) 423; *Alexander v. Roulet*, 13 Wall. (U. S.) 386; *Hooper v. Scheimer*, 23 How. (U. S.) 235. See also *Young v. Porter*, 3 Woods (U. S.) 343, 344; *Butler v. Young*, 1 Flipp. (U. S.) 276; *Ross v. Doe*, 1 Pet. (U. S.) 655; *Smith v. McCann*, 24 How. (U. S.) 398; *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Mezes v. Greer*, 1 McAll. (U. S.) 401; *affirmed* in 24 How. (U. S.) 268. But see *Turner v. Aldridge*, 1 McAll. (U. S.) 229; *Hylton v. Brown*, 1 Wash. (U. S.) 204; *Cowell v. Springs Co.*, 100 U. S. 55; *Stoddard v. Chambers*, 2 How. (U. S.) 284; and *Hale v. Gaines*, 22 How. (U. S.) 144. The recent case of *Wilson v. Fine*, 38 Fed. Rep. 789, in an exceedingly clear view of the title requisite to maintain ejectment, points out the error at the foundation of this theory, and likewise explains the fallacy of the "settled rule" that a patent for land carries with it the best title known to the court of law, and suggests the only intelligent basis of actions for the recovery of land: that the higher title between the parties must prevail without regard to an outstanding title, which neither strengthens nor weakens the title of either party. See the extensive quotations from this case in the preceding note. It would seem that the mistake in this doctrine lay in enlarging the well-known rule, that in a common-law action like ejectment, the legal title will prevail as against the equitable title, to a rule which requires the plaintiff to prove that he has the abstract legal title.

(g) *As Ground for Damages for Discontinuance of Highway.*—Possession under a claim of fee is in *Massachusetts* sufficient to maintain a petition for damages sustained by the discontinuance of a highway with which the land is connected.¹

(h) *Possession Under the Statute of Limitations.*—Possession with claim of fee for the period of the Statute of Limitations, will constitute a good title against all but the government.²

(i) *"Color of Title."*—In some jurisdictions, "color of title" is a requirement for the operation of a special statute of limitation of which the period is shorter than the common period. In the absence of statute, "color of title" offers no advantage, other than as explaining and supplementing acts which may constitute actual possession.³

c. COLOR OF TITLE—(1) *Generally.*—There is probably no term in all the law of such uncertainty as to meaning and effect as "color of title." It is owing to the indefiniteness of the term itself that various theories have existed differing so diametrically from each other. For a long time the theory prevailed that the virtue of color of title was in the resemblance it bore to a true title, when it was said to be "that which is in appearance a good title, but is in reality no title."⁴ Under this view it was generally held, though not without exception, that color of title could exist only by a written instrument.⁵ And the peculiar property

1. Possession of land for nine years under a claim of title in fee was, in *Hawkins v. Berkshire County*, 2 Allen (Mass.) 254, held *prima facie* sufficient to support a petition for damages thereto sustained by reason of the discontinuance of a highway. Deeds had been offered in evidence; by one of which, part of the land in question had been conveyed to the petitioner; but the court refused to permit a verdict on any ground except that of possession. It appeared that the petitioner had had charge and control of the land, and that he had leased it to a tenant for a number of years, who had had nothing to do with any other person but the petitioner in regard to the management of the land. The decision was based upon the case of *State Lunatic Hospital v. Worcester*, 1 Met. (Mass.) 437, where persons in the undisputed possession and occupation of lands over which the highway was established by the commissioners, were held entitled thereby, being aggrieved at the doings of the commissioners, to have a jury to determine the matter of their complaint under the statute.

2. See *LIMITATION OF ACTIONS*, vol. 13, pp. 693, 711 *et seq.*; *ADVERSE POSSESSION*, vol. 1, pp. 298-302.

3. See this subject considered generally *infra*, this title, *Color of Title*. See, however, *Parker v. Maycross, etc.*, R. Co., 81 Ga. 387, and *Hadley v. Bean*, 53 Ga. 688, where it was said that, "Possession under a deed without more, was sufficient to make out a *prima facie* case so as to render it necessary for the defendant to show that his possession was not that of a trespasser."

4. See *Wright v. Mattison*, 18 How. (U. S.) 50, where this is said to be "a meaning concurred in by the courts without exception"

This definition is rejected, as "without reason," and as "being abandoned," in *Bell v. Longworth*, 6 Ind. 273, *citing* *Summer v. Stevens*, 6 Met. (Mass.) 337; *Ang. on Lim.* (3d ed.) 503. See also *Holcroft v. Hunter*, 3 Blackf. (Ind.) 147.

So Chief Justice Gibson departs entirely from the definition in *McCall v. Neely*, 3 Watts (Pa.) 69. See also *Green v. Kellum*, 23 Pa. St. 254; 62 Am. Dec. 332. See *infra*, this title, *Definition*; also the review in 23 Cent. L. J. 408, of *Cooper v. Ord*, 60 Mo. 421, with sustaining cases, *cited infra*, this article.

5. See *Bouv. L. Dict.*, where the

was attributed to it of giving constructive possession to the whole tract claimed, of which but a small part was actually occupied; although the instrument was admittedly void;¹ and although it is

definition seems to be derived from the *Illinois* cases (and the federal decisions reviewing them) under the *Illinois* Statute of 1839 which expressly requires a paper title.

So in 3 Washb. Real Prop. *498, citing *Brooks v. Bruyn*, 35 Ill. 394, a similar definition is implied, when it is said: "As to what constitutes a color of title, any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. The color must arise out of some conveyance purporting to convey title to a particular tract of land." See *Shackleford v. Bailey*, 35 Ill. 391. But on the same page of this text-book (in what is apparently the original paragraph of the author's own edition), the law is stated more correctly: "If an entry be wrongful, though it be under a deed, a possession thereby gained will only extend so far as a tenant shall actually occupy the premises." There are cited among others, *Den v. Hunt*, 20 N. J. L. 487; *Little v. Megquier*, 2 Me. 176.

Even in an *Illinois* case, one which seems to be a leading case on the subject, *Woodward v. Blanchard*, 16 Ill. 424, it is said: "Color of title may be made through conveyance, or bonds, or contracts, or bare possession under parol agreement. . . . But our statute requires this color of title to be accompanied by a written evidence, a paper title. . . ." The decision was approved and largely quoted from, in *Wright v. Mattison*, 18 How. (U. S.) 50. But the court seems, nevertheless, to hold that a written instrument is the sole means by which the color of title may be acquired, when it says: "Decisions by this court . . . are deemed conclusive, that a claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyances to pass a title to the subject thereof, yet a claim asserted under the provision of such a deed is strictly a claim under color of title." See also *Gregg v. Sayre*, 8 Pet. (U. S.) 253; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Pillow v.*

Roberts, 13 How. (U. S.) 472; *Tate v. Southard*, 3 Hawks. (N. Car.) 119; 14 Am. Dec. 578; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351; *Gittens v. Lowry*, 15 Ga. 336; *Edgerton v. Bird*, 6 Wis. 527; 70 Am. Dec. 473. See *infra*, this title, *How Acquired; Under Statutes*.

1. In *Hunnicut v. Peyton*, 102 U. S. 333, it was held that, "Where one enters on unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed; that the true owner will be deemed to be disseised to the extent of the boundaries described in that title. . . . His possession beyond the limits of his actual occupancy is . . . a constructive one." See also *Clarke v. Courtney*, 5 Pet. (U. S.) 319.

The decision of Chief Justice Gibson in *Altamus v. Long*, 4 Pa. St. 254; 45 Am. Dec. 688, hardly sustains this doctrine. It is there said that, "A warrant and survey gives the owner constructive possession of all the land included by his lines, though no part of it be actually occupied by him." This would not seem to be consistent with the constructive possession over the same land, of an adverse holder actually occupying a part. "Giving, for the sake of the argument only, the same effect to the unofficial survey of the settler that could be claimed for a survey on a warrant . . ." are words clearly insufficient to attribute such a doctrine in this case. On the contrary, they show that the opposite was in the mind of the court, as does the account in the latter part of the opinion, where it is shown that only by the election of the tenant could there be such a constructive dispossession. See *Litt.*, § 417; *Taylor v. Horde*, 1 Burr. 60.

The doctrine of *Hunnicut v. Peyton*, 102 U. S. 333, would seem, however, to have been approved in a recent case in the *United States* Supreme Court, *Deputon v. Young*, 134 U. S. 241, where it was said, by Fuller, C. J.: "Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title." See also *Barr v. Gratz*,

only the legal title which can draw to itself a "constructive" possession.¹

4 Wheat. (U. S.) 213; Riley v. Jame-son, 3 N. H. 23; 14 Am. Dec. 325; Proprietors of Kennebec Purchase v. Springer, 4 Mass. 418; Hall v. Powel, 4 S. & R. (Pa.) 456; 8 Am. Dec. 722; Taylor v. Buckner, 2 A. K. Marsh. (Ky.) 18; 12 Am. Dec. 357, note.

In the decisions of the *New Jersey* supreme court, this doctrine has been totally rejected; notably in *Den v. Hunt*, 20 N. J. L. 487; and in *Foulke v. Bond*, 41 N. J. L. 527. In the former case, Whitehead, J., said: "It appears to me, that we cannot carry out this doctrine of constructive possession, without becoming involved in serious difficulties. There is always connected with an adverse possession the idea of wrong in the first place; it being an invasion of another's right. Whenever a party relies upon an adverse possession for his right to land, he impliedly admits that the strictly legal right is in another; and that this legal right has been wrongfully invaded, more than twenty years before action brought. And this idea of wrong is associated with every adverse possession in the first place, whether under color of deed or not. For it is a settled principle of law, that two persons cannot be severally seised in fee at the same time, of the same tract of land. If the title of one is good, that of the other is bad. Now if the one claiming under a defective paper title, however honest he may be, takes possession of a part of the land claiming it as his own, he does a wrong to him who has the legal title. It is an invasion of his right of possession. Is it right that this wrongful possession should be extended by construction, to the metes and bounds of the defective paper title, to the prejudice of him who has the legal right? I think not. There should be other evidence than a mere residence on, or inclosure, or cultivation of a small part. There should be proof of acts of ownership, or such acts and conduct, over the uninclosed part, as might fairly be considered evidence of an intention to assert an ownership and possession. There is another difficulty connected with this idea of constructive possession, involving the absurdity of two persons being, at the same time, by construction of law, in possession of the same

land. This must always be the case when this claim under a defective paper title, comes in conflict with the rights of the legal owner. To illustrate my meaning. When a person acquires a good and valid title to a tract of land, wild, uncultivated and unoccupied, he is, by construction of law, in possession of the whole tract. His right to it is complete; the title and possession are in him. Although not actually in possession of any part, he is constructively in possession of the whole. Suppose another person, claiming title to the same land, say a tract of 1000 acres, under a deed which is not valid in law, but which he believes conveys to him a good title, takes possession of a part of the tract, say ten acres, and resides on and improves it. He is here in the actual occupancy of a part, with a paper title for the whole tract; and upon the principle of some of the decisions, he must be, by construction of law, in possession of the whole. That is to say, he is in the actual occupancy of ten acres and constructively in possession of nine hundred and ninety acres. But this cannot be, because the legal owner, by virtue of this valid title, is constructively in possession of the whole tract, except the ten acres which are in the actual adverse possession of the other; unless we suppose the legal owner, and the person claiming under the defective title, to be both constructively in possession of the nine hundred and ninety acres, which in truth are not in the actual possession of either. But this, as I have said, cannot be. Two persons under conflicting titles cannot be, in construction of law, in the possession of the same land at the same time. The legal title draws to it the constructive possession."

1. And "two persons cannot be in adverse, constructive possession of the same land at the same time." 3 Washb. Real Prop. *485, citing *Hodges v. Eddy*, 38 Vt. 344. And yet in the same section the learned writer approves the doctrine of *Barr v. Gratz*, 4 Wheat. (U. S.) 213, and of *Hunnicutt v. Peyton*, 102 U. S. 333, that possession under "color of title" gives constructive possession. See also cases cited in the note immediately preceding; and see *infra*, this title, *Effect*.

This doctrine of color of title, in fact, the whole legal use of the term, seems to have little or no foundation in English cases—to be entirely of American origin.¹

While there were never wanting decisions contrary to the prevailing one, it is but lately that this doctrine has begun to wane. According to the best authorities and certainly the clearer reason, "color of title" has been shorn of its peculiar effect in giving constructive possession, and seems to be limited in its scope as a mere fact in evidence of claim, especially as to the particular nature of the claim and the extent of the premises.²

(2) *Definition*.—Color of title is any ground of claim of ownership of real property, other than mere occupancy, acquired in good faith, which on its face is legal, though actually void for the purpose of supporting title in itself.³

1. See *Tate v. Southard*, 3 Hawks (N. Car.) 119; 14 Am. Dec. 578. See, however, *Woodward v. Blanchard*, 16 Ill. 433, where the opinion reviews the subject at great length, citing the English cases, *Redford v. Barby*, 2 Cro. Jac. 122; *Austin v. Austin*, 2 Cro. Jac. 319; cases, however, which refer to personal property.

In *McCall v. Neely*, 3 Watts (Pa.) 69, Gibson, C. J., said that he was "not aware that the definition of a colorable title, or, as it has been expressed more frequently, color of title, had ever been attempted. The words do not necessarily import the accompaniment of the usual documentary evidence."

In *Waggoner v. Hastings*, 5 Pa. St. 300, the same learned judge holds that the doctrine of constructive possession in *England* and in the early *Pennsylvania* cases, applies only where "no other person has possession in fact or in law." But he holds the law to be otherwise in the *United States*, owing to changed conditions. So it is considered in *Fugate v. Pierce*, 49 Mo. 441. See note to *Taylor v. Buckner*, 12 Am. Dec. 358; and American note to *Taylor v. Horde*, 2 Sm. Lead. Cas. 563.

2. See *infra*, this title, *Definition; Effect; How Acquired*.

It is especially in the *New Jersey* cases of *Den v. Hunt*, 20 N. J. L. 487; and *Foulke v. Bond*, 41 N. J. L. 527, that the departure from the old doctrine is most sharply taken, and clearly set forth.

3. In *St. Louis v. Gorman*, 29 Mo. 593; 77 Am. Dec. 586, it was said by way of definition: "When we say a person has color of title, whatever may be the meaning of the phrase, we ex-

press the idea, at least, that some act has been previously done, or some event transpired, by which some title, good or bad, to a parcel of land of definite extent has been conveyed to him." The court added: "Can the making of the claim of a stranger upon the plat of his land by the owner, confer a color of title on one who has no priority in estate, in contract, or in law with the title of the stranger?"

The opinion of the court in *Bell v. Longworth*, 6 Ind. 273, departs from the customary definition of color of title, and also from the common doctrine as to its effect. Its substantial definition is that, "Where a party is in possession under and pursuant to a state of facts, which, of themselves, show the character and extent of his entry and claim . . . and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no colorable title does more; . . . for such title alone does not give right. Hence, it has been decided that possession under a 'sale or gift of land by parol' is under color of title." See *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Angell on Lim.* (3d ed.) 503; *Holcroft v. Hunter*, 3 Blackf. (Ind.) 147.

The court in *Bell v. Longworth*, 6 Ind. 273, rejects in strong terms the definition of the *United States* Supreme Court in *Wright v. Mattison*, 18 How. (U. S.) 50.

Chief Justice Gibson, in *McCall v. Neely*, 3 Watts (Pa.) 69, discarding the requirement of a written conveyance, says: "An entry is by color of title when it is made under a *bona fide*, and not pretended, claim of title exist-

(3) *Effect*.—The effect of color of title is as a fact or state of facts in evidence to show the *animus* of the entry and the extent of the premises claimed. But there must be a substantial holding, co-extensive with the boundaries, with sufficient notoriety.¹

(4) "*Good Faith*."—One of the two functions of color of title has been said to be to show the *animus* of the entry; *i. e.*, the purpose of the disseisor to assert and rely on his claim. Where

ing in another." But see a different view of the same learned judge in *Waggoner v. Hastings*, 5 Pa. St. 300.

In certain *Missouri* cases, where the decisions were founded upon the sound principles of the *Indiana* and of the *Pennsylvania* courts on this question, in the cases just cited, a conception was arrived at very similar to that which is believed to be the true one of "color of title." Thus in *Rannels v. Rannels*, 52 Mo. 112, it was held that, "Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrongdoer for a trespass on the remainder of the land, would be a sufficient color of title, under the Statute of Limitations, as against the real owner." And it was held that this color may be created by an act *in pais* without writing. See *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Ashley v. Ashley*, 4 Gray (Mass.) 197. This view was approved in *Cooper v. Ord*, 60 Mo. 431. The only fallacy which seems to cling to these (*Missouri*) decisions, is that which attributes a constructive force to the "color of title" without actual occupation, as where it is said: "To maintain an action against outside trespassers, there must be actual possession of a part of the tract, with color of title to the whole."

The definition of the court is based most particularly upon the *New Jersey* decisions in *Den v. Hunt*, 20 N. J. L. 487, and *Foulke v. Bond*, 41 N. J. L. 527, where, while the principle is clearly set forth, no actual definition is formulated. The substance of these decisions will be found at length, *infra*, this title, *Color of Title—Effect*.

1. The importance of the law here stated lies in the limitations of this effect as compared with the view of the older cases. The principle of "constructive possession," under color of title by an adverse holder, as set forth *supra*, this title, under *Elements or "Stages" of Title—In General*, and under *Color of Title—Generally*, must be discarded, and "color of title" by

deed describing the whole of a tract of which a part only is under actual occupation, must be denied, as a broad legal rule, the effect of extending such occupation to the whole tract.

This doctrine is set forth in 3 Washb. Real Prop. *485, but the only case cited is to the effect that the legal title to wild lands draws to it the possession, unless it has been interrupted by an actual possession by another. *Herdic v. Young*, 55 Pa. St. 177; 93 Am. Dec. 739. In fact, immediately following is the statement, that "two persons cannot be in adverse, constructive possession of the same land at the same time;" citing *Hodges v. Eddy*, 38 Vt. 344.

In a note to *Ewing v. Burnet*, 11 Pet. (U. S.) 41, it is remarked: "When an entry is made upon land under color of title, the same may be held by a constructive possession; but if made under a simple claim of title, the possession must be actual, a *pedis possessio*, definite, positive and notorious," citing *Bailey v. Irby*, 2 Nott & M. (S. Car.) 343; 10 Am. Dec. 609; *Gibson v. Martin*, 1 Har. & J. (Md.) 545; *Hog v. Perry*, 1 Litt. (Ky.) 171; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Smith v. Nowells*, 2 Litt. (Ky.) 160; *Hite v. Shrader*, 3 Litt. (Ky.) 444; *Braxdale v. Speed*, 1 A. K. Marsh. (Ky.) 106; *Smith v. Mitchell*, 1 J. J. Marsh. (Ky.) 270; *Skyle v. King*, 2 A. K. Marsh. (Ky.) 385; *Anderson v. Turner*, 3 A. K. Marsh. (Ky.) 133; *Doolittle v. Linsley*, 2 Aik. (Vt.) 155. But these cases, instead of sustaining the principle, seem rather to favor the opposite view. In *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, the doctrine is indeed set forth; but it was not necessary to the decision, and the case has less value, as it arose on a writ of right.

A more recent class of cases, while they omit the theory of "constructive" possession, yet give to color of title practically this effect, as a "fact showing the extent of the land claimed." In *Cooper v. Ord*, 60 Mo. 420, it was said that it does not always require a written instrument to constitute color

of title, but there must be some visible acts, signs, or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title. A note reviewing this case in 23 Cent. L. J. 408, considers that, by the cases cited, it appears that the sole office of color of title is to show the character and extent of the claim of one who enters upon land, and that any facts which of themselves show this character and extent constitute color of title; for "the entry under color of title upon a part of a tract of land operates as a disseisin of the true owner as to the whole tract embraced in the deed, and is equivalent to an actual and exclusive possession of the whole tract. . . . And the entry is referred to the color of title under which it was made, to define the boundaries of the claim and to characterize the possession. . . . And thereby the true owner has actual or constructive notice of the character of the disseisor's possession and the extent of his claim." See *Bell v. Longworth*, 6 Ind. 273; *Van Cleave v. Milliken*, 13 Ind. 105; *Rannels v. Rannels*, 52 Mo. 113; *Crispen v. Hannavan*, 50 Mo. 544; *Fugate v. Pierce*, 49 Mo. 447; *Waldron v. Tuttle*, 4 N. H. 371; *Prescott v. Nevers*, 4 Mason (U. S.) 326; *Putnam Free School v. Fisher*, 34 Me. 177; *Brackett v. Persons Unknown*, 53 Me. 231; 87 Am. Dec. 548; *Childress v. Calloway*, 76 Ala. 133, *citing* *Farley v. Smith*, 39 Ala. 38.

The true view of the effect of color of title is clearly marked out in the decisions of the *New Jersey* supreme court in *Den v. Hunt*, 20 N. J. L. 487; and *Foulke v. Bond*, 41 N. J. L. 527. In the former case, the court denies, at the outset, the doctrine of the *United States* Supreme Court relating to the constructive possession of an adverse holder under color of his defective deed, on the ground that adverse possession always begins by a wrong admitted by the adverse holder. It is said that this wrongful possession cannot be extended by construction to the metes and bounds of the defective paper title to the prejudice of him who has the legal right. It is clearly argued that since the legal owner of a tract of wild land is, without any occupation, in constructive possession thereof, if another person claiming title to the same land is in actual occupation of a small part with a paper title to the whole, the latter could not

be in constructive possession of the whole without arriving at the legal absurdity of two persons under conflicting titles being, in construction of law, in the possession of the same land at the same time. Denying, then, the effect frequently attributed to the "color" of a defective title, it is laid down, on the other hand, that actual occupancy is not necessarily required; that owing to the great variety in the nature of lands, in so far as they are susceptible of outward manifestations of ownership, it is impossible to lay down a general legal rule as to occupancy. The question whether possession has been held adverse, continuously, and with the requisite notoriety, is one of fact for the jury; nor is it held that a person claiming right to land by virtue of his adverse possession under color of title by a deed, is restricted to the land actually occupied or cultivated by him. The precise effect of color of title under the *New Jersey* doctrine then, seems to be simply as a fact in evidence along with other facts, such as acts of ownership, to show the *animus* of the entry and the extent of the claim by metes and bounds. "But" it was said in *Foulke v. Bond*, 41 N. J. L. 547, "whether there has been a substantial holding co-extensive with the boundaries in the deed, with sufficient notoriety to make title under it corresponding with the description, must be decided as a question of fact, from the nature and condition of the property, and the acts of ownership exercised over it, having regard to their frequency as well as to their character as open and notorious manifestations of the claim of title." The presumption that the possession is co-extensive with the boundaries of the title deed, is held to apply only to the owner of the legal title. "Color of title," it is said, "and actual occupation by residence, cultivation, or inclosure of part of the tract, or by other conspicuous acts of ownership by the disseisor, may serve to give character to his acts of possession over the residue, but will not relieve him from the obligation of satisfying a jury that his possession has been of such a character as, under the circumstances, may reasonably be expected to have informed the true owner of the nature of the possession and the extent of the title proposed to be acquired under it." This view, besides having the advantage of reason and justice, is also in

this claim is founded on mere occupation, nothing more than such a consistent hostile intention to assert is requisite.

Where the claim rests on color of title, there must be an honest belief of the disseisor in the genuineness and sufficiency of his "title" when acquired, however defective it may be in fact or form.¹ Otherwise it is clear that the *animus* being one of fraudulent design, cannot avail in itself to sustain an open, notorious, and adverse possession.² But it must be noticed that even here if

harmony with the oldest American cases, which stand in close relation with the course of English decisions. Thus, in *Doolittle v. Linsley*, 2 Aik. (Vt.) *155, it is said that one claiming title by possession, must have shown such acts of ownership exercised and performed by him . . . as would have subjected him to an action of ejectment by the original owner. Where the land is not susceptible of cultivation, acts which in themselves might constitute trespass, may be explained by a color of title. The latter performs its true purpose, then, in giving character to the acts of possession, or to the entry, and likewise, where the color of title is derived from matter of record, in giving public notice of the extent of the claim. See *Rannels v. Rannels*, 52 Mo. 112.

To this same effect are other old cases which have been supposed to ground the erroneous doctrine of "constructive" possession. See *Bailey v. Irby*, 2 Nott & M. (S. Car.) 343; 10 Am. Dec. 609; *Gibson v. Martin*, 1 Har. & J. (Md.) 545; *Hog v. Perry*, 1 Litt. (Ky.) 171; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Hite v. Shrader*, 3 Litt. (Ky.) 444.

The court, in *Foulke v. Bond*, 41 N. J. L. 527, relied to some extent upon the English cases of *Lord Advocate v. Lord Blantyre*, 4 App. Cas. 770; *Jones v. Williams*, 2 M. & W. 331; 2 Bing. N. Cas. 102; *Tyrwhitt v. Wynne*, 2 B. & Ald. 554; *Stanley v. White*, 14 East 332; also on the American cases of *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 416; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Cornelius v. Giberson*, 25 N. J. L. 1; *Cobb v. Davenport*, 32 N. J. L. 369. See the recent cases of *Cooper v. Morris*, 48 N. J. L. 607; *Doyle v. Wade*, 23 Fla. 90; *Word v. Box*, 66 Tex. 596. *Contra*, *Joy v. Stump*, 14 Oregon 361.

1. In *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463, it was

said: "If the entry is under color of title, the possession will be adverse, however groundless the supposed title may be. The fact of possession and its character, or the *quo animo* of the possessor are the test." As regards the case under review, it was said of the possession of the plaintiff, that his *quo animo* was apparent from his uniform claim of title, and continued exercise of acts of ownership; that the writing produced was in accordance with the possession he held, and the claim of title under it; that his entire confidence in his title, and his reliance upon its sufficiency to protect his possession were decisive of his own opinion and belief in the validity of his title. See *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511. See also *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587. In *McCall v. Neely*, 3 Watts (Pa.) 69, this element of *bona fides*, was considered the controlling one in color of title, where the latter is termed "a *bona fide* and not pretended claim of title. . . ." But in a later decision by the same court, the other element, the effect of the deed in showing the extent of the claim, is given in turn a disproportionate importance. See *Waggoner v. Hastings*, 5 Pa. St. 300. See also *infra*, this title, *Color of Title—How Acquired*.

2. **Animus as an Element in Adverse Possession.**—The intent of the disseisor is, as has been shown, of importance purely as evidence to be taken together with the acts performed as explaining their effect in constituting actual possession. In itself, the state of mind of the disseisor is of no moment whatever, no matter how hostile or evil intentioned. The distinction cannot be too carefully drawn between good faith as a requisite of color of title, and good faith in adverse possession generally. Good faith can have no bearing whatever, on adverse possession as such. But it is, nevertheless, an important element of color of title, paradox-

there has been actual possession, the fraud is no answer to the bar of the statute.¹

But this is the strict limit of the requirement of good faith "in color of title." Where adverse, hostile possession is concerned, there cannot be a question of *bona fides* between the true owner and the disseisor.

The only elements to be considered are time and notoriety. It is evident that an intent to conceal is inconsistent with this notoriety, and for this reason only it must destroy the effect of color of title.²

ical though it may seem, as a means of acquiring such adverse possession. There is no law that prevents the acquisition of a good title by adverse possession by a wrongdoer, who enters with all the bad faith of a Beelzebub, so long as he marks out the tract claimed by ordinary signs of actual occupation. But if he stands on the special ground of color of title claiming its advantages, the very substance of this claim is not a mere defiance of the owner, but the assertion with full and earnest intent of a distinct title (with defined boundaries), however defective such title may actually prove to be. The peculiar advantage lies in its quality as evidence of a claim decisively asserted and distinctly defined. It is clear that this peculiar advantage falls to the ground where the claimant is shown to have been conscious *ab initio* of the invalidity of his "title." Its force as evidence of the *animus* or spirit of the claim must vanish. See a discussion of this element in an article on "Color of Title," by H. C. Black, Esq., in 26 Am. L. Reg., p. 409.

1. See *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, where *Jackson v. Andrews*, 7 Wend. (N. Y.) 152, which seems to hold otherwise, is held corrected by the decision in *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463.

In the first mentioned case are cited the English decisions, bearing on fraud in general as answer to a statute of limitation, *Stowel v. Lord Zouch*, Plowd. Com. 371; *Cholmondely v. Clinton*, 2 Jac. & W. 155 (1 Turn. & Rus. 107); and also the cases of *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 174; *Prevost v. Gratz*, 6 Wheat. (U. S.) 497.

In scanning the authorities on this question, it must not be forgotten that some cases which may seem to hold otherwise in the text, merely say that a void deed will not in itself, without

actual possession, be of avail. See *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511. *Jackson v. Andrews*, 7 Wend. (N. Y.) 152, ruling to the contrary, was held overruled by *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463; *Parker v. Waycross, etc.*, R. Co., 81 Ga. 387.

In *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, the court said: "If the right be claimed under a void deed, it is not therefore less available than a claim without deed, which is yet admitted to be a bar. The question is on the *quo animo*, the intent. . . ." See the cases cited in the preceding note. Finally, the deed must not be so defective that its defect will appear plainly to a person of "average comprehension." *Tate v. Southard*, 3 Hawks (N. Car.) 119; 14 Am. Dec. 578; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351. It must have words of conveyance, a grantor, and a grantee. See *infra*, this title, *Color of Title—How Acquired*.

2. On this part of the question it is again the *New Jersey* case of *Foulke v. Bond*, 41 N. J. L. 547, which speaks with great clearness of reason. To quote from it at some length: "Fraud in obtaining or continuing possession or knowledge that the party's claim of ownership is unfounded and wrongful, will not deprive him of his title by adverse possession, or relieve the true owner of the consequences of the bar of the Statute of Limitations, if the possession of the intruder has, in fact, been adverse and has been asserted by such open and notorious acts of ownership as are essential in the acquisition of title by adverse possession. *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587. . . . *Jackson v. Huntington*, 5 Pet. (U. S.) 402. 'Disseizin ever implyeth a wrong.' Co. Litt. 153 b. . . . 3 Bac. Abr. 151."

But, "Possession clandestinely taken and held for the purpose of fraudu-

(5) *How Acquired.*—It is clear that a written instrument is not necessary. Color of title may exist by parol agreement, and by descent, as well as by deed or conveyance.¹ Some act must have been done, or some event transpired, by which some title, good or

lently concealing from the real owner, knowledge of the acts of ownership over his property, in virtue of which title is endeavored to be obtained, will defeat the effort to acquire title by such means, not on any general doctrine of fraud, but for the reason that possession under such circumstances would be devoid of that notoriety of the possession, and of the adverse claim which is necessary to perfect title by adverse possession . . . Thorpe v. Corwin, 20 N. J. L. 319. This is the doctrine of the law in all cases where the adverse possession commences with an actual disseisin . . . A disseisin may be effected by an entry under a deed . . . which is void. . . . In such a case . . . a party cannot have the advantage of an entry under color of title, unless his deed, which gives the colorable title, was obtained *bona fide*. . . . Den v. Hunt, 20 N. J. L. 487. But a grantee will not be deprived of the legal advantages of an entry under color of title, unless it be for actual fraud on his part. . . . Gregg v. Sayre, 8 Pet. (U.S.) 244. . . . There must be proof of actual fraud . . . proof of an intent to defraud the real owner. . . . Clapp v. Bromaghan, 9 Cow. (N. Y.) 529. Otherwise . . . a disseisin of one tenant in common by conveyance of the entire estate by his co-tenant, would be quite impossible." See the more recent case of Colgan v. Pellens, 48 N. J. L. 31, where it is held that the fraud which will preclude color of title must be actual; that an assertion, not of fact, but of a legal conclusion, though erroneous, is not actual fraud. See also Conyers v. Kenan, 4 Ga. 308; 48 Am. Dec. 226. As to fraud generally, in reply to the Statute of Limitations, were cited Paschal v. Davis, 3 Ga. 256; Troup v. Smith, 20 Johns. (N. Y.) 32; Leonard v. Pitney, 5 Wend. (N. Y.) 30; Allen v. Mille, 17 Wend. (N. Y.) 202; Brown v. Howard, 2 Brod. & B. 73; on actions in general, Battley v. Faulkner, 3 B. & Ald. 288; Granger v. George, 5 B. & C. 149.

On sustaining concealment of fraud as a good replication, were adduced Sherwood v. Sutton, 5 Mason (U. S.)

143; Bree v. Holbeck, Doug. 655. See Gregg v. Sayre, 8 Pet. (U. S.) 244.

In Munson v. Hallowell, 26 Tex. 475; 84 Am. Dec. 582, there is also a review of English and American authorities on the question of concealed fraud in answer to the statute, including among others 2 Stark. on Ev. 890; 6 Bac. Abr., Limitations (Bouvier's Am. ed.), p. 383; Massachusetts Turnpike Corp. v. Field, 3 Mass. 201; Jones v. Conoway, 4 Yeates (Pa.) 109; McDowell v. Young, 12 S. & R. (Pa.) 115; Rush v. Barr, 1 Watts (Pa.) 110; Pennock v. Freeman, 1 Watts (Pa.) 401; McKown v. Whitmore, 31 Me. 448; Bishop v. Little, 3 Me. 405; Hall v. McCormick, 7 Tex. 269; McDonald v. McGuire, 8 Tex. 361. *Contra*, are cited Leonard v. Pitney, 5 Wend. (N. Y.) 30; Allen v. Mille, 17 Wend. (N. Y.) 202; Miles v. Berry, 1 Hill (S. Car.) 296; Hamilton v. Smith, 3 Murph. (N. Car.) 115; Callis v. Waddy, 2 Munf. (Va.) 511. But see Rice v. White, 4 Leigh (Va.) 474. As to "*Good Faith*" in the Illinois Statute of 1839, see *infra*, this title, *Color of Title—Under Statutes*, as explained in Woodward v. Blanchard, 16 Ill. 424; *approved* in Wright v. Mattison, 18 How. (U. S.) 50, and in the recent case of Deputron v. Young, 134 U. S. 241, the construction is substantially the same as that of the text.

1. See Woodward v. Blanchard, 16 Ill. 424; Spradlin v. Spradlin (Ky. 1892), 18 S. W. Rep. 14. Under a deed void for the fraud of a vendor, where the vendee is innocent, Gregg v. Sayre, 8 Pet. (U. S.) 253. Under a void grant from the state, Moody v. Fleming, 4 Ga. 118; 48 Am. Dec. 210. Under a void tax deed, Edgerton v. Bird, 6 Wis. 527; 70 Am. Dec. 473; Lindsay v. Fay, 25 Wis. 460. See Waterson v. Devoe, 18 Kan. 223; Harrison v. Spencer, 90 Mich. 586. Under a void sheriff's deed, Beverly v. Burke, 9 Ga. 440; 54 Am. Dec. 351.

Payment of Taxes.—See Fletcher v. Fuller, 120 U. S. 534, *sustaining* Davis v. Easley, 13 Ill. 201; St. Louis Pub. Schools v. Risley, 40 Mo. 370. In the former case it was held, in an action of ejectment, that the payment of taxes indicated that the plaintiff claimed title to

bad, to a parcel of land of definite extent has been conveyed to the claimant.¹

(6) *Under Statutes*.—By the statute of one state, "claim and color of title made in good faith" are necessary for the acquisition of title by adverse possession. The statute further enacts that the person who has fulfilled all the requisites "shall be held and adjudged to be the legal owner . . . to the extent and according to the purposes of his or her paper title."² It will be

the whole tract, and likewise tended to explain the character and extent of his possession. The court, in *Fletcher v. Fuller*, 120 U. S. 534, also approved the decision in *Ewing v. Burnet*, 11 Pet. (U. S.) 54, where it was said that the payment of taxes on a lot for twenty-four consecutive years was "powerful evidence of claim of right to the whole lot."

As to tax deeds, and sales of land for taxes, see the article in 26 Am. L. Reg., p. 409, by H. C. Black, Esq., on "Color of Title," which discusses the ground of the decisions holding that a new sale of land by a tax collector will not give color of title. *Annan v. Baker*, 49 N. H. 161. See also *Childress v. Calloway*, 76 Ala. 128, and other cases cited in the above-mentioned article. Under a bond for title, where no purchase-money had been paid, *Elliott v. Mitchell*, 47 Tex. 450, citing *Scarborough v. Arrant*, 25 Tex. 131; *Miller v. Alexander*, 8 Tex. 36.

A claim under a written contract to convey, which equity would specifically enforce, was held sufficient claim under color of title in *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463. Under a forged deed, which must, however, be believed to be genuine, *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628; *Parker v. Waycross*, etc., R. Co., 81 Ga. 387; *Millen v. Stines*, 81 Ga. 655, *distinguishing Simmons v. Lane*, 25 Ga. 178.

As to void and defective titles generally, see *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 558; *Den v. Hunt*, 20 N. J. L. 487; *Woodward v. Blanchard*, 16 Ill. 424; *McCagg v. Heacock*, 34 Ill. 476; 85 Am. Dec. 327; *Ferguson v. Kennedy*, Peck (Tenn.) 321; 14 Am. Dec. 761; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463; *Conyers v. Kenan*, 4 Ga. 308; 48 Am. Dec. 226; *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Ewing v. Burnet*, 11 Pet. (U. S.) 54; *Tate v.*

Southard, 3 Hawks (N. Car.) 119; 14 Am. Dec. 578. See also *Brooks v. Bruyn*, 35 Ill. 394; cited, with other cases, *infra*, this title, *Color of Title—Under Statutes*; and *Pittsburg*, etc., R. Co. v. Reich, 101 Ill. 157. Where the decision seems contrary to prevailing view, see the full list of examples in the article on "Color of Title," by H. C. Black, Esq., in 26 Am. L. Reg. 407; also the note under *Swift v. Mulkey*, 18 Oregon 59.

Under a parol gift, *Sumner v. Stevens*, 6 Met. (Mass.) 337; and under a conditional promise, see *Moreland v. Moreland*, 121 Pa. St. 573; *Com. v. Gibson*, 85 Ky. 666; *Strutton v. Strutton*, 10 Ky. L. Rep. 607; *Wilson v. Campbell*, 119 Ind. 286; *Wheeler v. Laird*, 147 Mass. 421; *Braden v. Campbell* (Pa. 1885), 1 Atl. Rep. 580. Under an executory agreement, *Clapp v. Bromagham*, 9 Cow. (N. Y.) 558; *Jackson v. Harder*, 4 Johns. (N. Y.) 208; 4 Am. Dec. 262. Under a verbal partition, *Mitchell v. Allen*, 69 Tex. 70.

Entry Under Color of Title.—It was held in *Brobst v. Brock*, 10 Wall. (U. S.) 519, that where one had a right to enter on land by virtue of the mortgage of which he was assignee, it was a legal presumption that his entry was in right of deed under color of his title, and that he intended to assert his claim to the entry subject to the grant. See *Ellicott v. Pearl*, 10 Pet. (U. S.) 412.

1. See *St. Louis v. Gorman*, 29 Mo. 593; 77 Am. Dec. 586, where it is said, "he (the claimant) cannot claim under color of title in a person who has no privity." See generally the full list of cases cited in ADVERSE POSSESSION, vol. 1, p. 276 *et seq.*

2. *Illinois Act March 2d, 1839*, is incorporated in *Illinois Rev. Stat.*, ch. 24, pp. 104, 105, §§ 8–10 inclusive, entitled *Conveyance*; [an act which supplements the act of Jan. 17th, 1835, incorporated in *Rev. Stat. 1845*, ch. 66, pp. 349, 350, §§ 8–11, which is confined to titles deducible from record]. The provisions of these statutes are additional

to the common statute of twenty years' limitation. See *Woodward v. Blanchard*, 16 Ill. 427, which is the controlling case in the interpretation of the statute of 1839. In defining "claim and color of titles," it was said: "The act of taking possession, if otherwise unexplained, will be referable to the paper title, and understood as making claim under it. Color of title may be made through conveyances, or bonds and contracts, or bare possession, under parol agreements. Nor is it at all important whether the title be weak or strong, under general statute; for color of title is acquired to establish an adverse possession . . . which commenced by the disseisin of the rightful owners, with a claim of the land. But our statute requires this color of title to be accompanied by a written evidence, a paper title, and an act or motion of the mind."

In *Wright v. Mattison*, 18 How. (U. S.) 50, the *United States* Supreme Court gave a final decision in a case arising under the *Illinois* Statute of 1839, approving throughout and referring to the interpretation in *Woodward v. Blanchard*, 16 Ill. 424.

As regards good faith in the person making claim or acquiring color of title, the court in the former case, *Wright v. Mattison*, 18 How. (U. S.) 50, approved the rule that color of title is matter of law; that good faith in the person claiming under such color is purely a question of fact; that while the facts in the title might not be urged against it as destroying color, they might have an important and legitimate influence in showing the want of confidence and good faith in the mind of the vendee, if they were known to him. The following language of the court in *Woodward v. Blanchard*, 16 Ill. 424, was confirmed: "Good faith is doubtless used here in its popular sense, as the actual existing state of the mind; whether so from ignorance, skepticism, sophistry, delusion, fanaticism or imbecility, and without regard to what it should be from given legal standards of law or reason." In a recent case, the *United States* Supreme Court, by Fuller, C. J., approved all the definitions and decisions above mentioned, adding the remark, in *McCagg v. Heacock*, 84 Ill. 476: "The good faith required by the statute in the creation or acquisition of color of title, is a freedom from the design to defraud the person having the better title, and

the knowledge of an adverse claim to, or lien upon property, does not of itself indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien." See the following cases cited in *Woodward v. Blanchard*, 16 Ill. 424: *Radford v. Harbyn*, 2 Cro. Jac. 122; *Austin v. Austin*, 2 Cro. Jac. 319; *Moody v. Fleming*, 4 Ga. 118; 48 Am. Dec. 210; *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 200; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 558; *Jackson v. Harder*, 4 Johns. (N. Y.) 208; 4 Am. Dec. 262; *Riggs v. Dooley*, 7 B. Mon. (Ky.) 238; *Taylor v. Buckner*, 2 A. K. Marsh. (Ky.) 19; 12 Am. Dec. 354; *Roberts v. Sanders*, 3 A. K. Marsh. (Ky.) 29; *Overfield v. Christie*, 7 S. & R. (Pa.) 174; *McCall v. Neely*, 3 Watts (Pa.) 70; *Lawrence v. Hunter*, 9 Watts (Pa.) 73; *Watson v. Gregg*, 10 Watts (Pa.) 295; 36 Am. Dec. 176; *Ash v. Ashton*, 3 W. & S. (Pa.) 513; *Patterson v. Reigle*, 4 Pa. St. 204; 45 Am. Dec. 684; *Waggoner v. Hastings*, 5 Pa. St. 300; *Dikeman v. Parrish*, 6 Pa. St. 219; 47 Am. Dec. 455; *Fitch v. Mann*, 8 Pa. St. 503.

In *Brooks v. Bruyn*, 35 Ill. 393, in an action of ejectment, where the defense was adverse possession under the Statute of Limitations with color of title, the court, by Beckwith, J., said: "Any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title, and because it does not, for some reason, have that effect, it passes only color, or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title, because the grantor had none to convey, or had no authority, in law or in fact, to convey one, or whether such want of authority appears on the face of the instrument, or *aliunde*. The instrument fails to pass an absolute title, for the reason that the grantor was not possessed of some one or more of these requisites, and, therefore, it gives the semblance or color only of what its effect would be if they were not wanting. The law presumes that all men act in good faith, until there is some evidence to the contrary; and, in the absence of evidence, color of title is presumed to have been so acquired." The following

noticed that the phrase "claim and color" is very different in effect from the common phrase "claim or color." Similar statutes exist in other states.¹

Tennessee is the only state where, in the absence of special statute, "color of title" has been held to be necessary for the acquisition of title by adverse possession under the common Statute of Limitations.²

II. MODES OF ACQUISITION OF TITLE—1. General Classification.—Title to real property is acquired either by operation of law or by act of the party. The sole mode by which title may be acquired by operation of law is descent. Purchase, in its strict legal meaning, denominates every mode of acquisition of title other than descent. Thus the fundamental classification of modes of acquisition of title is by *descent* and by *purchase*.³

cases are relied on *Shakelford v. Bailey*, 35 Ill. 387; *Dickenson v. Breedon*, 30 Ill. 279; *McCagg v. Heacock*, 34 Ill. 476; 85 Am. Dec. 327; *Cook v. Norton*, 43 Ill. 391; *Elston v. Kennicott*, 46 Ill. 187; *Morrison v. Norinan*, 47 Ill. 477; *Hinkley v. Greene*, 52 Ill. 223; *Winstanley v. Meacham*, 58 Ill. 97; *Hardin v. Crate*, 60 Ill. 215; *Rawson v. Fox*, 65 Ill. 200; *Fagan v. Rosier*, 68 Ill. 84. See also *Bailey v. Doolittle*, 24 Ill. 579; *Bowman v. Wettig*, 39 Ill. 416; *Stumpf v. Osterhage*, 111 Ill. 82; *Winslow v. Cooper*, 104 Ill. 235; *Connor v. Goodman*, 104 Ill. 365. But see *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157, where it was held that the deed of commissioners of highways was not color of title, when such commissioners could not be party grantors in a deed of conveyance.

1. *Georgia*.—*Georgia Code*, § 2683, was said in *Royall v. Lisle*, 15 Ga. 545, to negative entirely the idea of title by occupancy alone, however *bona fide* it might be, and to that extent to be in derogation of the common law. *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628. See *Millen v. Stines*, 81 Ga. 655; *Parker v. Waycross, etc., R. Co.*, 81 Ga. 387; *Davis v. Stripling*, 32 Ga. 656. See, however, *Georgia Code*, § 2682; *Stimson's Stat. Law*, § 1120.

See *Pennsylvania* *Purd. Dig.*, tit. *Limitations of Actions*, said in *Kirk v. Smith*, 9 Wheat. (U. S.) 317, to have been repealed by the subsequent act of 1785.

Wisconsin.—The early statute of 1849, providing a period of limitation, where there is color of title by tax deed, was thoroughly considered in *Edger-ton v. Bird*, 6 Wis. 527; 70 Am. Dec.

473. See also the valuable note by Vilas and Bryant, summing up the conclusions. Also *Sprecker v. Wakeley*, 11 Wis. 432; *Lindsay v. Fay*, 25 Wis. 460; *Waterson v. Devoe*, 18 Kan. 223. "The whole subject" was, however, "considered, revised and amended by the *Wisconsin* legislature, by the enactment of ch. 309, Laws of 1880." See the thorough discussion of the statute in *Urquhart v. Wescott*, 65 Wis. 135, *distinguishing* *Ruggles v. Fond du Lac County*, 63 Wis. 205. See *Tennessee Stats.*, § 3459; *Colorado Stat.*, §§ 2186-7, where the phrase is "claim and color of title;" *Louisiana Rev. Civ. Code* (1875), §§ 3474-5, 3478-3479, 3499; *New Mexico Stat.* 1880. See also § 2747, *New Jersey Revision* (1877); *Limitations*, § 24; *North Carolina Code*, § 139; *California Civ. Code*, § 325. See *Reynolds v. Lincoln*, 73 Cal. 191.

2. See *Ferguson v. Kennedy*, Peck (Tenn.) 321; 14 Am. Dec. 761, note, *citing* *Waterhouse v. Martin*, Peck (Tenn.) 392; *Barton v. Shall*, Peck (Tenn.) 215; *Powell v. Harman*, 2 Pet. (U. S.) 241; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 185; and under the Act of 1819, ch. 28, enacting a seven-years' period, *Wallace v. Hannum*, 1 Humph. (Tenn.) 443; 34 Am. Dec. 659. Color of title was expressly held unnecessary in *Watson v. Gregg*, 10 Watts (Pa.) 289; 36 Am. Dec. 176.

3. See 4 Kent's Com. *374, where titles by curtesy and in dower are in the note considered "to fall more properly under the head of title by descent," *citing* Co. Litt. 18 b; Harg. note 106; and the article on Alienation in *American Law Mag.*, Oct. 1843; *Pemberton v. Hicks*, 1 Binn. (Pa.) 1.

2. **Title by Descent**—(See SUCCESSION, vol. 24, p. 344).—Descent is that mode of acquisition of title by which one, by operation of law, succeeds on the death of his ancestor to his estate as heir.¹

3. **Title by Purchase**.—Purchase, in its strict legal meaning, signifies any mode of acquisition of title other than descent.²

TO.—A term of exclusion, unless by necessary implication used in a different sense.³

1. 2 Bl. Com. *201; Bouv. L. Dict.; 2 Minor's Inst. 451, *citing* 2 Co. Litt. 156 and note; 4 Kent's Com. *374. See EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; HEIR, vol. 9, p. 357; HEREDITAMENTS, vol. 9, p. 359; LEGACIES AND DEVISES, vol. 13, p. 7; REAL PROPERTY, vol. 19, p. 1028; SUCCESSION, vol. 24, p. 344.

2. See Williams on Real Prop. (6th ed.) *100, "Possession to which a man cometh not by title or descent," *citing* Co. Litt., § 12. "A devisee under a will is accordingly a purchaser in law." Within the meaning of the Statute 3 and 4 Wm. IV. vol. 106, which has considerably changed the law of descent in England, a purchaser prescribed as the *stirps* or stock of descent, is "the last person who had a right to the land, and who cannot be proved to have acquired the land by descent, or by certain means" (escheat, partition, and inclosure), "which render the land part of, or descendible in the same manner as, other land acquired by descent." Williams on Real Prop. *100.

3. Bradley v. Rice, 13 Me. 201; 29 Am. Dec. 501.

A word of exclusion, when used in describing premises, unless by necessary implication manifestly used in a different sense. Montgomery v. Reed, 69 Me. 514; Wells v. Jackson Iron Mfg. Co., 48 N. H. 491; People v. Jones, 112 N. Y. 605.

"To" an object excludes the terminus referred to. Bonney v. Morrill, 52 Me. 252; State v. Bushey, 84 Me. 459. And see generally Schumacker v. Toberman, 56 Cal. 508; Stearns v. Sweet, 78 Ill. 446.

Where land is described as extending "to," and then bounding upon, a road, the grant extends to the center of the way, unless there is some further circumstance to control the construction. Reed's Petition, 13 N. H. 381; Goodeno v. Hutchinson, 54 N. H. 159.

But general terms of description in 26 C. of L.—4

a deed, like "to," "upon," or "along" a highway or railroad, do not convey the land to the center of the road or highway, unless the grantor owns the fee therein. Church v. Stiles, 59 Vt. 642.

In Thomas v. Hatch, 3 Sumn. (U. S.) 178, it was held that a boundary "to" a stream, includes the flats, at least to low-water mark, and in many cases, to the middle thread of the river, though it was said that it might be different where the boundary was "to" the bank.

But the word "to" may be sometimes taken inclusively, according to the subject-matter, and where a turnpike company was empowered by its charter, to carry the road to a certain city, it was held that the object of the grant was to open a good road to the compact part of the city, and that the road did not terminate on arriving at the bounds or charter limits, several miles from the business center. Farmer's Turnpike Road v. Coventry, 10 Johns. (N. Y.) 389. And in Hazelhurst v. Freeman, 52 Ga. 244, a company chartered to build a railroad to a city was held authorized to build it into the city; McCay, J., saying that "from" and "to" do not have a precise fixed meaning, but may mean from within, and into." And see to the same effect McCartney v. Chicago, etc., R. Co., 112 Ill. 626; 29 Am. & Eng. R. Cas. 326; Moses v. Pittsburg, etc., R. Co., 21 Ill. 516; Rio Grande R. Co. v. Brownsville, 45 Tex. 88; RAILROADS, vol. 19, p. 834.

In Moran v. Legotte, 54 Mich. 87, it was said that, "The word 'to,' as commonly made use of, conveys to the mind the idea of movement towards and actually reaching a specified point or object; and the meaning is not satisfied unless the point or object is actually attained. But this use is not universal; the word is sometimes employed in a sense that embraces a part of this idea only, or simply as a word of direction."

TOBACCO.—See note 1.

TOKEN.—A material, visible sign of the existence of a fact.²

TOLERATE.—(See also SUFFER, vol. 24, p. 489; PERMIT, vol.

To and From.—(See also FROM, vol. 8, p. 981).—"To and from the *Illinois* shore," in a contract by a railroad company with a ferry company to always employ the latter's ferry to transport across the river all freight and passengers arriving or departing by said company's railroad, does not mean "to and from" all parts of the shore. *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 6 Cent. L. Jour. 215.

There cannot be derived from the charter provisions of a company to run "to and from" a town, the obligation to run trains to a particular spot within its limits. *People v. Louisville, etc., R. Co.* (Ill. 1886), 25 Am. & Eng. R. Cas. 235.

A reservation in a deed, of a right to lay tracks "to and from" certain kilns to the track of a railway, was construed to mean "to and from" the locality where the kilns were situated, in such a manner and to such an extent as to enable the owner to enjoy their use and possession for the purposes named in the reservation. *James v. Fonda*, 58 Vt. 453. As to sales to arrive, see SALES, vol. 21, p. 643.

"To"—Omission of in Indictment.—See FORGERY, vol. 8, p. 520.

1. Tobacco cannot be considered as either a drug or a medicine, or as an article of food, within the exceptions of the *Missouri* statute, allowing drugs and medicines, and food where it is a case of necessity, to be exposed for sale on Sunday. *State v. Ohmer*, 34 Mo. App. 124. And see Anonymous, 12 Abb. N. Cas. (N. Y.) 458.

Granulated tobacco, as used in the internal revenue laws, is not synonymous with snuff, but refers to certain kinds of chewing and smoking tobacco. *Venable v. Richards*, 1 Hughes (U. S.) 326.

2. Abb. L. Dict. A "sign" or "mark." *State v. Green*, 18 N. J. L. 181. As used in statutes against obtaining money or property by means of false tokens, see, in addition to cases set out below, numerous examples in FALSE TOKENS, vol. 7, p. 794. As used in a statute punishing the obtaining of a signature, money, etc., by any false "token" or pretense, it means "a sign, a mark, a symbol." *Jones v. State*, 50 Ind. 476.

A bank check may be a false token, and would be such, under the *California* statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it. *People v. Donaldson*, 70 Cal. 118.

The common law extended to cheats effected by means of any false "token," having a semblance of public authority, or in any manner touching the public interest. *People v. Johnson*, 12 Johns. (N. Y.) 292; *Respublica v. Powell*, 1 Dall. (Pa.) 47. And where fraud at common law is charged to have been effected by means of a false "token," the token must be such as indicates a general intent to defraud; a mere privy token, or counterfeit letters in other men's names, seem not to come within the term "false token," as used at common law. *People v. Stone*, 9 Wend. (N. Y.) 182. And see *Com. v. Warren*, 6 Mass. 72. But a fraud perpetrated upon an individual, without the use of "false tokens," or any deceitful practice affecting the community at large, and without the aid of a conspiracy, but the result of a false assertion, was not indictable at common law. *State v. Justice*, 2 Dev. (N. Car.) 199.

Promissory notes are not of themselves public tokens, but bank notes are. An indictment, therefore, for a cheat at common law, by passing certain promissory notes as and for bank notes, without an averment that they resemble bank notes, cannot be sustained. *State v. Patillo*, 4 Hawks (N. Car.) 348.

The false passing, as a true note, of a false and forged note purporting to be a note of a bank which never existed, and procuring goods by means thereof, is not such an offense as comes within an act to prevent the deceitfully obtaining goods by privy token or counterfeit letters; but it is a public cheat indictable at common law, if the defendant knew that it was a false note, and it is necessary in such case to aver the *scienter* in the indictment. *Com. v. Speer*, 2 Va. Cas. 65. See also *Rex v. Wheatley*, 2 Burrow 1125; *Lara's Case* 2 Leach 652.

18, p. 334).—To allow so as not to hinder; to permit as something not wholly approved of; to suffer; to endure; to admit.¹

TOLL—(See also BRIDGES, vol. 2, p. 540; CARRIERS, vol. 2, p. 784; FERRIES, vol. 7, p. 951; FREIGHT, vol. 8, p. 901; INJUNCTIONS, vol. 10, p. 978; LOGS AND LUMBER, vol. 13, p. 1038; TURNPIKES).—The word toll applies at common law to a very large class of dues and exactions which are in the nature of fixed rights, and which cannot be lawfully exceeded. They are generally, if not universally, connected with some franchise which involves duties as well as privileges of a general or public nature. The right to receive fixed tolls is found in fairs, markets, mills, turnpikes, ferries, bridges and many other classes of interests where the owner of the franchise is obliged to accommodate the public, and the public in turn are protected from extortion by an obligation to pay only regular dues.² The word is used also in reference to the sum which one railroad company received from another for the use of its tracks.³

Toll is used, too, to express the compensation allowed by law and custom to a miller for grinding grain.⁴

TON—(See LOAD, vol. 13, p. 974).—Used to denote weight,⁵

1. Gregory v. U. S., 17 Blatchf. (U. S.) 330.

2. McKee v. Grand Rapids, etc., R. Co., 41 Mich. 279.

In Pennsylvania Coal Co. v. Delaware, etc., Canal Co., 29 Barb. (N. Y.) 592, the court, by Clerke, J., said: "Toll is a Saxon word, originally signifying a payment in towns, markets and fairs, for goods and cattle bought and sold there. It is defined in the Institutes to be a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable, within the same. It is now, also, popularly applied to the charges which canal and railroad companies require for the transportation of goods, payable no doubt at once, in all cases, where there is no right or arrangement importing the contrary—precisely as goods sold are presumed to be sold for cash, unless by express terms, or from the circumstances of the case, the transaction shows a credit. The word means nothing more than a compensation for the privilege or service granted or rendered; and the period of payment depends entirely, as in every other case, upon the express or implied understanding of the parties."

Toll Distinguished from Freight.—See FREIGHT, vol. 8, p. 901. And see also Lake Superior, etc., R. Co. v. U. S., 93 U. S. 454, and dissenting opinion of Mr. Justice Miller on p. 457.

3. Com. v. New York, etc., R. Co., 145 Pa. St. 38; Boyle v. Philadelphia, etc., R. Co., 54 Pa. St. 310; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

4. Lake Superior, etc., R. Co. v. U. S., 93 U. S. 458.

5. In England, the ton is estimated at twenty hundred weight of 112 lbs. each, known as the long ton. 41 and 42 Vict., ch. 49, § 14.

In the United States, the ton is estimated at 2,000 lbs., known as the short ton. In the appraisal of imports, the word "ton" is declared by statute to mean twenty hundred weight, each hundred weight being 112 lbs. U. S. Rev. Stat., § 2951.

But the custom or common understanding as to the meaning of the word may be shown, and will control its meaning when used in a contract. In The Miantinomi, 3 Wall. Jr. (U. S.) 48, a contract was made to furnish coal by the ton, which up to the time of making the contract was understood to be 2,240 lbs. It was held that that number of pounds must be furnished, notwithstanding the fact that the state previously fixed the weight of coal at 2,000 lbs. per ton. And in Many v. Beekman Iron Co., 9 Paige (N. Y.) 188, where the parties to a contract intended to contract for a certain number of tons gross weight at a specified

Definition and Nature. TONTINE INSURANCE. The System Generally.

and measure.¹ A ton, in measurement, is forty cubic feet; in weight, 2,000 pounds (short ton), or 2,240 pounds (long ton).

TONNAGE AND TONNAGE DUTIES—(See **TAXATION**, vol. 25, p. 43).—Tonnage in the *United States* is a vessel's internal cubical capacity in tons of one hundred cubic feet each, to be determined in the manner prescribed by Congress.² And tonnage duties are duties upon vessels in proportion to this capacity.³

TONTINE INSURANCE.—(See also **ANNUITY**, vol. 1, p. 592; **ESCHEAT**, vol. 6, p. 854; **INSURANCE**, vol. 11, p. 278; **JOINT TENANTS AND TENANTS IN COMMON**, vol. 11, p. 1057; **LIFE INSURANCE**, vol. 13, p. 629; **LOTTERIES**, vol. 13, p. 1164; **SURVIVORSHIP**, vol. 24, p. 1027.)

I. Definition and Nature, 52.

1. *The Tontine System Generally*, 52.
2. *Its Application to Life Insurance*, 54.
 - a. *In General*, 54.
 - b. *The Plan of Operation*, 54.
3. *Analogies in Other Branches of the Law*, 56.
4. *Estimates of Tontinism*, 58.

5. Characteristics of the Tontine Policy, 60.

- a. *In General*, 60.
- b. *Forfeiture*, 61.
- c. *Non-Participation*, 62.

II. The Status of Policy-holders, 63.

III. Rights of Insured and Beneficiaries, 65.

1. *Accounting*, 65.
2. *Reformation of Policy*, 67.
3. *Assignment of Policy*, 68.

I. DEFINITION AND NATURE—1. **The Tontine System Generally.**—Tontine insurance is that form of life insurance which adds and applies to the ordinary contract of indemnity, the principles involved in the scheme of financiering invented by Lorenzo Tonti, an Italian banker of the 17th century.⁴ Some explanation of the latter

price per ton, but in the written contract the term tons only was used, it was held that in an action at law upon the contract, it could not be shown that any other than the statute ton of 2,000 lbs. was intended, but that the party injured by the mistake might file a bill to reform the written contract so as to make it conform with the intention of the parties.

In *Barry v. Bennett*, 7 Met. (Mass.) 354, it was held that the words "one ton of wire," used in a contract, might be shown by parol evidence to mean a certain mass of wire stored in a certain place and denominated a ton, and not a precise ton by weight.

In *Pennsylvania*, 2000 lbs. avoirdupois constitute a ton. *Weaver v. Fegeley*, 29 Pa. St. 27; 70 Am. Dec. 151; *Evans v. Myers*, 25 Pa. St. 114. So in *New York*. 1 *New York Rev. Stat.* 609, § 35.

1. A ton measurement contains forty cubic feet of space. Where a charter

party stipulated "to carry out seven hundred tons measurement of assorted cargo, or more, if that does not make or draw over fourteen feet of water," it was held to be no violation by the charter party if, when laden with three hundred and sixty tons, she drew fourteen feet, and the owner refused to carry more. *Roberts v. Opdyke*, 40 N. Y. 260.

2. U. S. Rev. Sts., § 4153.

3. Bouv. L. Dict.

By the Constitution of the *United States*, p. 1, § 10, par. 2, the states are prohibited from levying any duty of tonnage. For numerous cases relating to the question whether wharfage duties are within the constitutional prohibition, see **TAXATION**, vol. 25, p. 43.

4. Tonti was a Neapolitan by birth, but emigrated to *France* about the middle of the 17th century, and there brought his project to the attention of Cardinal Mazarin, then prime minister. The "Tontine Royale," the first

Definition and Nature. *TONTINE INSURANCE.* The System Generally.

system, therefore, will aid materially in reaching a proper understanding, both of the general and the legal nature of the Tontine insurance contract.

The essence of Tontinism consisted in reserving for the last survivor among several investors, the profits realized from their common investment.¹ Originally the system was used as a method of floating public loans, the profits being guaranteed to the last surviving subscriber.² Measures of this kind were employed in *France* as early as 1689,³ and in *England* by 1692,⁴ and thereafter were frequently resorted to in both countries, the

proposal of its kind, was sanctioned by an edict of the king in 1653; but the parliament refusing to register this edict, the plan was never carried out. As proposed, it included a public loan of 1,025,000 francs, to be taken by subscriptions of 300 francs each. The entire loan was to be divided into ten equal portions and the subscribers into a corresponding number of classes. The interest of each of these portions was to be divided among those of the proper class living when such interest matured. The last surviving subscriber was, of course, to receive the whole current subscription and upon his death it was to escheat to the state. Concerning other plans of Tontini, a writer in the "Gentleman's Magazine" for 1791 (part 1, page 27), says: "Three years after he tried his project again for building a stone bridge over the Seine, when it had both the favor of the court and the sanction of parliament, under the title of Banque Royale, but it failed again; for somebody having given it the unlucky name of Tontine, nobody in Paris would trust his money in a lottery that had an Italian title. The last attempt poor Tontini made was to get his plan adopted by the clergy for the payment of their debts; but though they acknowledged the ingenuity of it, they rejected it as unfit for their purposes."

1. "As life insurance is, commercially, profit by dying, so the Tontine is profit by surviving." Fowler, "History of Insurance in Philadelphia," (1888,) p. 698.

2. See note *supra*.

3. The writer in the "Gentlemen's Magazine" above quoted, thus describes the early French Tontines: "When Louis XIV. was distressed by the league of Augsburg, and granted money beyond what the revenues of the kingdom would furnish, for supplying his enormous expenses, he had recourse to

the plans of Tontini, which, though long laid aside, were not forgotten; and by an edict in 1689 created a Tontine Royale of 1,400,000 livres annual rent, divided into fourteen classes. The actions were 300 livres apiece, and the proprietors were to receive 10 per cent., with benefit of survivorship in every class. This scheme was executed but very imperfectly; for none of the classes rose above 25,000 livres, instead of 100,000, according to the original institution; though the annuities were very regularly paid. A few years after, the people seeming in better humor for projects of this kind, another Tontine was erected upon nearly the same terms; but this was never above half full. They both subsisted in the year 1726, when the French king united the 13th class of the first Tontine with the 14th of the second; all the actions of which were possessed by Charlotte Bonnemay, widow of Louis Barbier, a surgeon of Paris, who died at the age of 96. This gentlewoman had ventured 300 livres in each Tontine, and in the last year of her life she had for her annuity 73,500 livres, or about £3,600 a year for about £30."

4. "The first government life annuities were created in *England* by a proposal to borrow £1,000,000, payable in Tontine annuities; first £100,000 to be paid per annum to the subscriber (10,000 in number of £100 subscription each) with nominees surviving, until 1700; then £70,000 to be paid annually. A table was compiled in connection with this proposition, showing a life decrement yearly of the initial 10,000 nominees in ninety-nine years (1694-1793). Deaths the first year, 1694, were 2.82 per cent. of the living; 1695, 2.84 per cent. of the living. The interest or payment to each £100 contributor, £8 17s. in 1701, advanced to £14 1s. in 1715, with 4,966 nominees

last instance in *England* being in 1789.¹ Later the Tontine principle was applied to private annuities, and finally to other forms of investment. Companies for erecting buildings and promoting other semi-public works have often been organized in *America*, as well as in the aforementioned countries, on a plan which was intended to secure the fruits of the enterprise to the surviving contributors.² Communistic ventures have also been undertaken on the Tontine principle (though not by that name), property being surrendered into a common stock for the joint lives of all members, the longest lived to acquire ultimately the whole.³

2. *Its Application to Life Insurance*.—*a.* IN GENERAL.—The Tontine idea having thus been long before the public mind, the transition from general financiering to life insurance, which is always a fruitful field for novel schemes of investment, was easy. As soon as life insurance passed beyond its crudest form, and the insurer began to offer the insured a share in the profits of the investment, and to write policies maturing at a fixed time, and not at death only, the opportunity arose for applying the Tontine system to this field. As early as 1853, a life insurance company, which conducted business on the Tontine plan, was organized in Philadelphia,⁴ and this was but a transplantation to *America* of insurance methods already long in vogue in the old world. The issue of Tontine policies now forms an important part of the business transacted by several of the foremost American life-insurance companies,⁵ as well as by many of less prominence.

b. THE PLAN OF OPERATION.—As in the case of ordinary life insurance,⁶ every premium payment is regarded as composed of three parts, each of which is apportioned to a particular fund which the company maintains.⁷ One part is set aside with

alive at end of year—death rate of the year, 3.49 per cent. The annual payments to contributors having living nominees yearly increased until 1792, when for the last nominee alive were to be received, by the table, £70,000. Here the question of average life duration or age influence on human vitality was of no account to the annuity-granting government. The last survivor was the sole measure of its obligation." Fowler, "History of Insurance in Philadelphia" (1888), p. 608.

1. This was a loan of £1,000,000 in shares of £100 each. "Notes and Queries," 3d series, p. 213. And see a discussion as to the methods of administering this Tontine, "Notes and Queries," 4th series, vol. 10, pp. 12, 72, 151 and 215.

2. "American Cyclopaedia," vol. 15, p. 797; "Encyclopaedia Britannica," (9th ed.), vol. 23, p. 444. A hotel in Glasgow was built on this plan, the last

shareholder dying in 1862. "Notes and Queries" 3d series, vol. 2, p. 339.

3. *E. g.*, the "Harmony" or "Economy" society of *Pennsylvania*, whose plan of organization is described and given judicial sanction in *Schriber v. Rapp*, 5 Watts (Pa.) 351; 30 Am. Dec. 327.

4. Fowler, "History of Insurance in Philadelphia" (1888), pp. 697-8. In another place (p. 756), the same author speaks of Tontinism as "a *New York* movement starting in 1867."

5. *E. g.*, the *New York Life*, the *Equitable Assur. Soc. of New York*, the *United States* and the *Northwestern Mutual of Milwaukee*. See a list of those investigated by a committee of the *Ohio* legislature. Tabor, "Three Systems of Life Insurance" (1886), p. 43.

6. *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.) 499; 11 Ins. L. J. 219.

7. It is not necessary that the funds be kept separate; but only that distinct

others to accumulate into a sufficient source for the payment of policies as they mature, and is called the reserve fund. Another part is absorbed into the expense fund, which comprehends the cost of maintaining the company. The remaining portion of the premium goes to the surplus fund, which is also increased by earnings from the investment of the reserve. In most modern companies this surplus is regularly distributed among the policyholders. Under the ordinary system, this distribution is made

accounts of them be maintained. *Pierce v. Equitable Life Assur. Co.*, 145 Mass. 56; 18 Ins. L. J. 110; 1 Am. St. Rep. 433; *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328, 338.

Tontine Bookkeeping.—The method of maintaining these three funds, and keeping accounts under the Tontine system, is necessarily the most important feature in its practical workings, and is likely to be the subject of extensive inquiry in future litigation concerning it. A detailed statement of these methods is therefore desirable. The following description is taken from the testimony of an actuary of the Equitable Life Assurance Society, before the investigating committee of the *Ohio* legislature in 1885: "As to policies in the Tontine classes, a special account is kept of the income and outgo properly belonging to these classes, separate from the other business of the society, so that the amount of the Tontine fund—that is, the share of the whole amount of assets properly belonging to policies in the Tontine classes—can be ascertained at the end of each year. To do this, the Tontine fund is credited with all premiums received from Tontine policies, is charged with a due proportion of expenses upon these premiums, receives credit for interest upon its accumulations proportionate to that made on the total funds of the company, and has to pay the losses by death (occurring among the Tontine policies only) and the claims of such policies as reach the end of their Tontine periods. At the end of each year the total amount of the Tontine fund, and the total amount of reserve necessary to have on hand to secure the original and absolute obligations under the Tontine policies, is calculated, and the difference between these amounts is the Tontine surplus, part of which belongs to the policies completing their Tontine periods in each year just entered upon, while a far larger part belongs to the far more numerous policies which will mature in

the many succeeding years. As the Tontine policies, after completing their Tontine terms, leave the Tontine class, and cannot participate in future divisions of surplus, the opportunity to correct in each future division any error made in previous distributions is taken away, and it is necessary to determine with accuracy the share of the surplus belonging to the outgoing members of the Tontine class. It would have simplified the calculations, perhaps, to have made separate classes for each year of issue of policies with the same Tontine period, so that there would be no mingling of the claims of policies leaving the class with the claims of policies having yet many years to remain in the class. But there was the insuperable objection to this plan that in small numbers, and even in numbers of considerable magnitude, irregularities will arise, very troublesome in practice, and giving rise to grave suspicions of unfairness, and it is therefore desirable in all life-assurance calculations to take advantage of the largest averages attainable. It was therefore decided that all policies with the same length of Tontine period, no matter in what year issued, should be classified together for the purpose of determining the rate of dividends to be allowed, and the plan in detail was this: Rates of interest, of mortality, of lapses, and of management expenses, were assumed, approximating to the actual as nearly as possible. On the basis of these rates a calculation of what would be the surplus on policies taken out at every age, and at the end of every year of their existence during the Tontine period, was made, and tables of estimated surpluses for all possible contingencies formed. With these tables it is easy at the end of each year to calculate the expected surplus on each policy in force. The total of these expected surpluses, when compared with the total actual surplus, as shown by the valuation of the Tontine policies, gives a ratio of the expected to the actual

annually, or at some longer fixed period, to all policy-holders. But by the Tontine plan, a division of the surplus is effected only at the end of the time for which insurance is taken (called the Tontine period), and only upon those policies the holders of which then survive and who have met their premium payments during the whole period.¹ In operating on the Tontine plan, a company must use care to make the plan conform to, and not depart from, the statute under which it is organized. Thus, where the statute provides for a sum to be set aside and invested for the exclusive purpose of a "guaranty fund," the use of the same as a "Tontine reserve fund" is illegal and will justify a dissolution of the company.²

3. Analogies in Other Branches of the Law.—While the Tontine system first came before the courts at a comparatively recent date, notions analogous to it have long formed a familiar part of the law. As these will probably throw much needed light on questions arising in future litigation over the Tontine contract, they deserve a brief consideration. Perhaps the closest resemblance to the Tontine idea is found in the rules of survivorship in joint tenancies at common law.³ Land held under this system

surplus; and applying this ratio to the expected surplus by the tables of policies just maturing, we get the actual surplus to which they are entitled. The actual surplus for each policy whose Tontine term is not ended, could, of course, be calculated in the same way by applying the ratio to the estimated surplus on them as given by the tables; but as these policies cannot draw any surplus till their Tontine period is concluded, this detailed calculation would be useless; and it is sufficient to leave this surplus undisturbed to accumulate for another year, when the same work of calculation and of distribution to the policies then maturing has to be repeated." Quoted in Tabor, "Three Systems of Life Insurance," pp. 47, 48.

1. For judicial discussions of the Tontine plan, see *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150. And compare *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 18 Ins. L. J. 110; 1 Am. St. Rep. 433; *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.) 499; 11 Ins. L. J. 219. For a general description, see Tabor, "Three Systems of Life Insurance" (1886), pp. 40, 41.

2. In *Chicago Mut. L. Ins. Assoc. v. Hunt*, 127 Ill. 257, the court said: "We think it clear that such disposition of the reserve fund was in direct violation of the letter, as well as the spirit, of the statute. The moneys

from which it was to be accumulated, viz.: those collected for the payment of death benefits, were dedicated and set apart by the statute to that purpose alone, and any other application of them was expressly prohibited. It follows that a reserve fund accumulated from that source could be lawfully applied to no other purpose than that of paying death benefits. But, in addition to this, the section of the statute permitting the accumulation of such fund expressly provided that the fund should belong to the association—a provision which necessarily excludes the idea of its belonging to, or being distributable among, the persistent surviving members of a particular class. Doubtless it was the intention of the statute, in providing for the accumulation of a reserve fund, to place the association in such condition as to be able to pay its death benefits with greater promptness and certainty, and perhaps to provide against unexpected drafts upon its resources by extraordinary mortality, caused by the visitation of epidemic diseases, when the ordinary death assessments would be likely to prove insufficient."

3. This analogy seems to have been borne in mind by Ch. J. Paxson, in *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, where, speaking of the Tontine arrangement, he says: "It appears to resemble to some extent a conveyance

of tenure belonged to the owners jointly, the entire estate devolving finally upon the last surviving owner.¹ The ordinary canons of inheritance were of course suspended,² as well as the rights of dower and curtesy.³ Rules corresponding to the above were also applicable to the joint tenure of personal estate,⁴ but the system, so far as it concerns realty, is now rapidly becoming obsolete. Statutes abolishing, or at least greatly changing, the character of estates in joint tenancy, have been enacted in many states,⁵ and in others joint tenancies are not favored and are generally treated as tenancies in common.⁶ The principle seems likely to be revived, however, in construing certain forms of policies,⁷ and its importance in the law of Tontine insurance becomes apparent. Thus the full amount of an ordinary life policy⁸ or mutual-benefit certificate,⁹ originally made payable to the insured's "wife and children," accrues, on the death of one of these beneficiaries before payment, to the survivors. A rule somewhat similar has been applied to a fire policy taken in the name of two persons.¹⁰ In one instance, where a statute was in force declaring against joint tenancies in real estate, a certificate payable to a wife and daughter was held to make them joint tenants in the fund, with the right of survivorship.¹¹

between two or more persons as tenants in common, with a right of survivorship." The right of survivorship, however, was not an incident of tenancies in common, but of joint tenancies alone. See also *Farr v. Grand Lodge*, 83 Wis. 446, where a similar analogy is suggested.

1. **Survivorship.**—"From the same principle also arises the remaining grand incident of joint estates; viz.: the doctrine of survivorship, by which, when one or more persons are seised of a joint estate, of inheritance, for their own lives, or *per auter vie*, or are jointly possessed of any chattel interest, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. . . . This right of survivorship is called by our ancient authors, the *jus accrescendi*, because the right upon the death of one joint tenant accumulates and increases to the survivors," citing *Co. Litt.* 280, 281; 2 *Bl. Com.* *183 *184. See also 1 *Washb. Real Prop.* (4th ed.) 643; *Williams Real Prop.* 134; *Tiedeman Real Prop.*, § 238.

2. "The great distinctive character-

istic of joint tenancies among estates of which there is a joint ownership, is the right of survivorship, by which, though the estate is limited to them and their heirs, the survivor or survivors take the entire estate, to the exclusion of the heirs or representatives of the deceased co-tenant." 1 *Washb. Real Prop.* (4th ed.) 643.

3. 1 *Washb. Real Prop.* (4th ed.) 649; 2 *Co. Litt.* 37 b.

4. 2 *Bl. Com.*, p. *399.

5. See *Tiedeman Real Property*, § 237, and notes where these states are enumerated.

6. *Maxwell v. Higgins* (Neb. 1894), 57 N. W. Rep. 388; *Tiedeman Real Property*, § 237.

7. See *Bacon Benefit Soc. & Life Ins.*, § 264, and also cases cited in the following notes.

8. *Robinson v. Duvall*, 79 Ky. 83; 9 *Ins. L. J.* 897; 42 *Am. Rep.* 208.

9. *Covenant Mut. Ben. Assoc. v. Hoffman*, 110 Ill. 603; 14 *Ins. L. J.* 220.

10. *Northrup v. Philips*, 99 Ill. 449. Here the insured were described as having a two-thirds, and a one-third interest respectively, but the court held that they were entitled to share equally, and that the one who had collected two-thirds was obliged to account to the other for the excess over one-half.

11. In *Farr v. Grand Lodge A. O.*

Another analogy to the Tontine system is seen in certain associations which hold property in common under an arrangement by which the last survivor is to receive the whole. Such associations are lawful and will be protected by the courts, and a member's privilege of withdrawal during life is not transmissible to his personal representative, so as to enable the latter to recover the intestate's portion.¹

4. *Estimates of Tontinism*.—The Tontine scheme, at least before its application to life insurance, was often viewed as a species of lottery.² But so far as it has yet come before the courts, they have declined to construe it as having more of the gambling feature than other forms of insurance contract.³ For, as has

U. W., 83 Wis. 446, the court said: "The analogy between legacies and the benefits secured by a certificate or policy of a benefit insurance company, when the insurance is payable to two or more persons jointly on the death of the assured, is still closer. The assured, like a testator, makes provision in writing for his wife and children, to be enjoyed on his death. He can change the direction of his bounty during life. So far as the doctrine of joint tenancy and survivorship are concerned, they are strictly within the same reason. . . . So that we conclude that this insurance in joint tenancy with the right of survivorship is within the exception of our own statute in analogy to devises, and that the doctrine of the common law governs it. This is a new question in this state, but we are satisfied that the application of this doctrine in this case is within reason and the authorities."

1. See *Schriber v. Rapp*, 5 Watts (Pa.) 351; 30 Am. Dec. 327, where Gibson, C. J., says of the "Harmony" or "Economy" Society founded by George Rapp: "It has not been pretended that this society is detrimental to the public or its neighbors. It is an ecclesiastical community, performing with alacrity its duties to the laws, rendering unto Cæsar the things that are Cæsar's, and fashioning its rules of municipal property and government after the models of those Christian societies that existed in the days of the apostles. Its most peculiar features are submission to the will of its founder, and equal participation of property brought into the common stock by individuals or produced by the labor of the whole. That it is not a partnership, results from the fact that the profits are not shared in

severalty. At the period of initiation the neophyte surrenders his worldly wealth to the society, reserving to himself but the contingent right of resumption in the event of his secession, to which none but those who were creditors at the time could object, for all else would deal with him on the basis of a transfer already made. In the present instance, it is not alleged that there were creditors; without which, as was determined in *Buchler v. Gloninger*, 2 Watts (Pa.) 226, the administrator could not interfere. It is supposed, however, that as the intestate had power, by the articles, to secede from the society and take out of it whatever he had brought into it, the successor to his personal rights may exercise it as his representative. Such, however, are not the terms of the articles; nor would a posthumous exercise of the power, consist with the disposition he thought fit to make by dying in fellowship. An exercise of it by the administrator of one dead without kindred, would wrest the property from the society only to give it to the state by escheat. The right of secession, therefore, is intransmissible."

2. See "Encyclopedia Britannica," vol. 23, p. 544.

3. "It is proper to remark, however, that the cases which have been cited in regard to gambling policies have little, if any, application here. The policy in question was not a gambling policy. It was taken out by Mr. Hooper on his own life, and the premium was paid by him. It was held, in *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192, that a man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest, and that such a transaction is not a wagering policy. This

been said,¹ "All insurance is based more or less upon the doctrine of chances," and hence, the contract as a whole is to be classed as aleatory.² But it is nevertheless a valid contract unless it becomes a mere wager,³ and the Tontine form of it stands on the same legal footing as the ordinary policy.⁴ Aside from its consideration by the courts, the merits of the Tontine plan have been a fruitful subject of controversy among those engaged in the business of life insurance. Charges have been made by its critics and vigorously denied by its defenders, to the effect that it is a gambling scheme,⁵ and that the abnormal profits which it offers to surviving policy-holders accrue at the expense of the less fortunate ones.⁶ An impartial authority speaks of the plan as one which "tends to redress the inequalities of the original contract,

results from the right which a man has to dispose of his own property." *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, where collateral to the policy was an instrument termed a "Tontine assignment," by which the amount of the policy was made payable in trust to a "Fiduciary Agency," which was empowered to distribute the proceeds of the whole group of policies among the survivors at the end of the Tontine period.

In *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, 156, the court observed on this same point: "It was claimed by the counsel for the appellant, on the argument, that this insurance contract was a gambling contract, and that the plaintiff was in effect betting on the chances of the continuance of her husband's life, beyond the Tontine period of ten years, and that the company had bet against her. We cannot assent to this view."

1. Dykman, J., in *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150.

2. May on Ins. (3d ed.), vol. 1, § 5.

3. *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150.

4. See *supra*, this title, *The Plan of Operation*.

5. In answer to this charge, advocates of the system quote the following from the report of a committee appointed by the Ohio legislature in 1885, to investigate it: "Gambling, as usually understood, is a scheme by which one gets something for nothing—where no valuable consideration is given by the winner to the loser—where the gain to one is precisely offset by the loss to the other—and where the gain or loss depends, not

upon the will or power of either party, but rather upon mere chance or skill. It is usually condemned as a vice, as subversive of public morals, as wicked and unlawful. Nothing in the evidence obtained by the committee shows, or even tends to show, that such grave charges can be justly brought against Tontine life insurance. On the contrary, the evidence clearly proves that Tontine companies derive solid advantages from Tontine contracts, and can safely promise, and in fact do give, great and solid benefit to Tontine policy-holders. Statistics abundantly prove, for instance, that when applicants for insurance deliberately elect to pay larger premiums than are absolutely necessary, as Tontine policy-holders do when they elect to forgo the usual yearly dividends, they thereby give evidence, unconsciously perhaps, or by instinct, that they expect to live to enjoy the benefits promised in case of long life—in other words, they give evidence of superior vitality, which is more reliable in determining the value of the risk than the most skillful medical examination. It is clearly proven that the rates of mortality, and also the rates of lapses, or discontinuances, are far less among Tontine than among non-Tontine policy-holders. These constitute the solid advantages of Tontine contracts, and the companies can give, and in fact do give, in return, ample and compensating advantages in the way of larger dividends or surplus and larger surrender values than can be safely promised or given under ordinary policies." Tabor, "Three Systems of Life Insurance," pp. 43, 44.

6. See Massachusetts Life Ins. Rep. 1885, p. 45, where the insurance com-

the profits being assigned to the longest lives to a larger extent than in the common life-insurance system . . . where it is the man who dies early who obtains advantage for his heirs at the expense of the long liver."¹

5. Characteristics of the Tontine Policy—*a. IN GENERAL.*—In most of its provisions, the policy denominated "Tontine" does not differ from the ordinary form of the life-insurance contract.² It has the same limitations upon the liability of the insurer; the same clauses excepting "suicide;" "the use of intoxicants and narcotics;" "duelling, violating law, or conviction of felony;" the same restrictions on occupation, travel and residence; the same strict requirements of absolute good faith on the part of the applicant in making statements as to age, health, etc. Tontine policies are likewise issued on the endowment plan, for a term of years,³ or for life,⁴ and they command "the usual rates of premium."⁵ The peculiarities of the Tontine policy consist chiefly in its provisions regarding (a) forfeiture for non-payment of pre-

missioner of that state says: "The inducement to the investment is not the worthy product of capital in useful employment, but the expected profits for forfeitures enforced against policyholders who are unable to keep their policies in force. And these forfeitures are taken from the widow and orphan, and the unfortunate most in need of the help and protection of life insurance, for the benefit of the more fortunate, who need it less or not at all. How the Tontine operates to defeat the primary object of life insurance must be clear to the dullest apprehension. The forfeitures already divided or set apart as profits for the survivors under this system, if applied under the *Massachusetts* law, would have provided for dependent family support to the amount of tens of millions of dollars. The companies engaged in Tontine business claim a notable financial success. If the corporations, expensively carried on, get wealthy out of it, and certain of the investment policyholders make great profits out of it, as the companies promise, it must be at grievous loss to somebody who can ill afford the loss."

To the views of which the above is an expression, the legislative report, above quoted, replies as follows: "The whole testimony obtained by the committee disproves this charge. The rates of discontinuances, except in the first two or three years, when the conditions of the two contracts are similar, are far less among Tontine than among non-Tontine policies, and this is easily ac-

counted for. The penalty in case of lapse, and the reward in case of persistence, are both greater. The definite promise to pay a large sum in cash at the end of the Tontine period, as surplus and guaranteed surrender value, furnishes a substantial collateral, available, if necessary, to borrow money to pay premiums, and would thus enable a Tontine policyholder to keep up his insurance when an ordinary policyholder would be compelled to lapse, or to accept (as a semi-Tontine policyholder might also do) a small paid-up insurance. Human nature is so weak that it often neglects duties which are for our own interest or benefit, unless there is a penalty for the non-performance, or a reward for the performance of the same."

1. "Encyclopedia Britannica," vol. 23, p. 444.

2. Tabor, "The Three Systems of Life Insurance" (1886), p. 39.

3. "Policies of this character are kept in classes of 10, 15, and 20 years, according to their Tontine periods; and while the funds of each class are not kept separate, distinct accounts are kept with each class so as to show the amount to which it is entitled, and by this means the amount due upon each policy at the expiration of its Tontine period." *Pierce v. Equitable Life Assur. Soc.*, 18 Ins. L. J. 111; 145 Mass. 56; 1 Am. St. Rep. 433.

4. Tabor, "The Three Systems of Life Insurance" (1886), p. 39.

5. Tabor, "The Three Systems of Life Insurance" (1886), p. 39.

miums, and (b) apportionment of dividends, or the participation of the insured in the profits of the company.¹ These two features, then, will be briefly noticed.

6. **FORFEITURE.**—By the provisions of early policies of insurance, the holder who failed at any time to pay his premiums was deprived of all future² benefits from the contract. Not only did he not receive any allowance of credit for past payments, but the policy itself ceased to be operative upon the occurrence of the default. The hardships of this provision seem not to have been felt, sufficiently, at least, to bring about a change, until 1861, when the legislature of *Massachusetts* enacted the famous non-forfeiture law, by which so much insurance as the sum of premium payments would purchase, was secured to the defaulting policy-holder.³ Statutes having a similar purpose have been

1. *Massachusetts Life Ins. Rep.* 1885, p. 45. Tabor, in the work above cited, sets out (p. 39), the exclusively Tontine provisions as follows: "The first stipulation is as follows: 'No dividend shall be allowed or paid upon this policy until the person whose life is insured thereby shall survive the completion of its Tontine dividend period, and unless this policy shall then be in force.' The period referred to is either ten, fifteen or twenty years, according to the choice made by the policy-holder in his original application. The effect of this stipulation is that each premium must be paid in full in cash, during the Tontine period, without being reduced by dividends. The second stipulation is: 'Previous to the completion of its Tontine dividend period, this policy shall have no surrender value in a paid-up policy or otherwise.' The effect of the stipulations above quoted is to produce savings to the company, first, in not paying out dividends, and secondly, in not issuing paid-up policies in case of lapse. The value of such savings, with their accumulations, is credited to the Tontine policies which complete their respective periods."

2. The "protection" or insurance which he had enjoyed was supposed to constitute a past benefit.

3. *Massachusetts Stats.* 1861, ch. 186. Since this act is at once the starting-point and model of American legislation on this subject, its provisions are here quoted in full:

"Section 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this commonwealth, shall be forfeited or become void by the non-payment of

premiums thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the 'combined experience' or 'actuaries' rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be canceled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.

"Sec. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease; and provided also, that the company shall have the right to deduct from the amount insured in the policy, the amount at six per cent. per annum of the premiums that had been forborne at the time of the death."

enacted in various other states.¹ The life-insurance companies, also, induced by this reformatory legislation, as well as by competition, have inserted corresponding provisions in most of their contracts, so that now the holder of the ordinary policy may protect himself from a total loss of payments thereunder.

The Tontine policy, however, is in this regard a return to the original type. The scheme upon which it is based requires for its fullest success the addition of all lapses, or accumulated payments on policies the holders of which are subsequently in default to the Tontine fund.² Hence, even in those states where non-forfeiture laws are in force, Tontine policies are excepted from their provisions, and the clause in such policies which provides for prompt payment of premiums under penalty of losing all rights in the contract, is rigidly applied.³ Such is the first characteristic of the Tontine contract.

c. NON-PARTICIPATION.—Another advantage which marks the modern policy of life insurance as different from the old, is the privilege which it usually confers upon each holder of sharing in the profits of the company which issues it. This is commonly termed the distribution of dividends,⁴ and is a feature necessarily absent from the Tontine contract. For, by the latter, these profits or dividends, instead of being distributed regularly among all policy-holders, are set aside and accumulated into a general fund, to be shared at the end of the Tontine period, only by those of that class of policy-holders who then survive.⁵ This plan is valid and will be protected by the courts.⁶ Until the expiration of the Tontine period, a beneficiary has no interest in the general fund, and no distribution thereof can be compelled;⁷ nor can the company be required to invest the Tontine fund separately from other funds.⁸

1. See Richards on Insurance, pp. 580, 581, where the text of some of these statutes is given.

2. Tabor, "The Three Systems of Life Insurance" (1886), p. 43; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 427; 4 Am. St. Rep. 482.

3. Alexander on Life Insurance, p. 12; *Pierce v. Equitable L. Ins. Co.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, where the court says: "The plaintiff has forfeited all her rights under the policy named as a contract of insurance, by the failure to pay the annual premiums, and so her rights are foreclosed for that reason on this branch of the case." And again (p. 157): "It must be borne in mind, after all, that the plaintiff never acquired any vested rights in the Tontine fund,

because she voluntarily ceased the payment of premiums, and her policy lapsed for that reason before the expiration of her Tontine period."

4. See *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, 156.

5. Tabor, "The Three Systems of Life Insurance," p. 39; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 427; 4 Am. St. Rep. 482; *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 18 Ins. L. J. 110; 1 Am. St. Rep. 433.

6. See cases in following notes, and compare Alexander on Life Insurance, p. 12.

7. *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, 154.

8. *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309.

II. THE STATUS OF POLICY-HOLDERS.—The Tontine relation has been compared to a partnership,¹ but the comparison is correct only in a general and popular sense. It has been expressly decided that holders of ordinary policies in companies organized on the stock plan are not partners, even though they share to a limited extent in the profits.² The same has been held of members of mutual life-insurance companies,³ and unincorporated benefit associations.⁴

There seems to be no decision which applies a different rule to Tontine policy-holders, and the prevailing doctrine, which denies to them the right to compel an accounting,⁵ practically settles their status as different from that of partners.

Nor are the holders members or stockholders of the company which insures them. Since they do not participate in the management of the company, or enjoy other rights of membership, they are not subject to its burdens.⁶

There seems to be somewhat more difficulty in determining whether the relation of trustee and *cestuis que trustent* exists

1. The Policy-holders are not Partners.

—"A Tontine policy-holder is somewhat like a special partner, putting capital into a mercantile business for a term of years. He would not be allowed to withdraw his capital at will—that might ruin the business—but at the end of the partnership period he would have the right to withdraw his entire capital and his full share of the profits." Report of Committee of *Ohio* Legislature, appointed to investigate insurance, 1885. "The name of a partnership composed of creditors or recipients of perpetual or life rents or annuities, formed on the condition that the rents of those who may die shall accrue to the survivors, either in whole or in part." Bouv. L. Dict.

2. "There is a provision in the charter of this company that the stockholders may receive a semi-annual dividend of not exceeding three and one-half per cent. and that, at intervals of three years, the net profits, after paying such dividends, shall be paid, twenty per cent. to the stockholders, and eighty per cent. to the policy-holders. It is claimed that this sharing in the profits makes the policy-holders partners. These profits were not to be paid to them as the income of any business which they were carrying on or in which they were interested. They were the profits of the company in its business. The policy-holders could make no profits. They could never receive back more money than they paid,

and never as much, interest upon their payments being taken into account; and hence any dividend to them under this charter could in no proper sense be called, as to them, profits. As to the company, they might be profits earned by good management and too large premiums—profits earned solely out of the stockholders. These so-called profits, when divided, would be simply an equitable adjustment of premiums paid. If such profits should exist, they would show that the company had been exacting more premiums than were just and fair; and the excess was to be refunded in this mode. This novel claim of partnership is not sustained by any authority." *People v. Security L. Ins., etc., Co.*, 78 N. Y. 123-4; 34 Am. Rep. 522. See, to the same effect, *Bewley v. Equitable L. Assur. Soc.*, 61 How. Pr. (N. Y.) 345; 10 Ins. L. J. 636.

3. *Cohen v. New York Mut. L. Ins. Co.*, 50 N. Y. 610; 10 Am. Rep. 522; *Taylor v. Charter Oak L. Ins. Co.*, 59 How. Pr. (N. Y.) 468.

4. *Brown v. Stoerkel*, 74 Mich. 269. But see *Pritchett v. Shafer*, 2 W. N. C. (Pa.) 317.

5. See *infra*, this title, *Accounting*.

6. **The Policy-holders are not Members or Stockholders.**—"The plaintiff is not a member of the corporation, but its creditor, who has contracted with it. At the end of a fixed period, having complied with the contract on his own behalf, and made the payments required, he is entitled to have appor-

between the insurer and its Tontine policy-holders. A life-insurance company is not, according to the great weight of authority, a trustee for the holders of its ordinary forms of policies.¹ And so far, at least, a similar view has been adopted concerning the relation of the company to its Tontine policy-holders.² Even in *Massachusetts*, where the right to an accounting is allowed to the insured, the absence of any trust relation has been at the same time admitted.³ In *Illinois*, however, a different theory is advanced. There the Tontine fund seems to be regarded in the light of trust money, of which the officers of the company are trustees and the policy-holders are beneficiaries.⁴

On the whole, it seems that the status of Tontine policy-holders is not materially different from that of mere general creditors of

tioned to him his share of a certain computed fund. The defendant has no right to withhold it, as a corporation may withhold a dividend from a stockholder." *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 114.

1. Are the Policy-holders *Cestuis Que Trustent*?—*Hencken v. U. S. L. Ins. Co.*, 9 Ins. L. J. 912; 16 N. Y. Weekly Dig. 44; *Bewley v. Equitable L. Assur. Soc.*, 61 How. Pr. (N. Y.) 345; *Mathew v. Northern Assur. Co.*, L. R., 9 Ch. Div. 80. *Compare Re Haycock's Policy*, L. R., 1 Ch. Div. 611; *Lothrop v. Stedman*, 42 Conn. 589.

In *Hencken v. U. S. L. Ins. Co.*, 9 Ins. L. J. 916-17, the court said: "The position taken in plaintiff's behalf is substantially that the defendants were administering a trust fund, of which they were 'cestuis que trustent,' and having made profit by advantage taken of unsuspecting policy-holders, they (plaintiffs) are enabled to set aside the transaction, irrespective of the fact whether or not they suffered damage. A trustee cannot deal with trust funds to his own aggrandizement; the profit will inure to the beneficiary. But there is no such relationship here. Where is the fund in which the plaintiffs as policy-holders have an interest? The counsel intimates it to be the accumulated assets of the corporation over and above the capital stock. If this be sound, there is a right of property belonging to some one at some time. When, and to whom, and how, and by whom, is its amount to be ascertained? When the sum insured is paid to whomsoever entitled, it has been supposed all connection between the parties to the policies ends. The premiums have been met, and the contract of the company ful-

filled. The idea of any rights in plaintiff beyond those secured by the policy at its maturity cannot be maintained. There being no trust relation between them and the company, argument founded upon its existence cannot prevail, irrespective of the question whether or not the corporation realized profit."

2. "We are convinced, after a careful examination of the character of the relations existing between the parties, that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity." *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 428-9; 4 Am. St. Rep. 482. See also *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; 9 Ins. L. J. 250; *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100; *Pierce v. Equitable Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110.

3. *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110.

4. In *Chicago Mut. L. Indemnity Assoc. v. Hunt*, 127 Ill. 257, the court said: "Such officers are trustees, having funds intrusted to their care, to be safely and honestly kept and administered, not for their own benefit, but solely for the promotion of the laudable objects for which the association is organized. It is a duty of primary importance, incumbent on all trustees, to keep proper accounts of trust funds; for unless that is done the beneficial owners are subjected to constant uncertainty as to their rights, and to a constant liability to be defrauded.

the company. Aside from the *Illinois* decision above referred to, the courts have expressly designated them as creditors,¹ and contracting parties with the company,² or, where they have not been so specific, have practically treated the relation as if it were merely one of debtor and creditor.³ Still, where this theory would favor one class of policy-holders to the prejudice of others, it is not followed. Thus, under a plan by which mutual benefit certificates were issued, maturing in twenty-eight years, with eight equal periods of distribution, it was held that, in proceedings to wind up the concern, members whose certificates had earned the amount of the first distribution, were not creditors, in the sense that such amount could be paid in full out of the assets of the company, but that these assets were to be shared equally among all members.⁴

III. RIGHTS OF INSURED AND BENEFICIARIES—1. Accounting.—Probably the most important question with which the courts have yet been called upon to deal in connection with Tontine policies, is the right of a holder of such policy to demand an accounting from the company in respect to his interest in the Tontine fund. The peculiar nature of this fund and its partial dependence upon the skill and fidelity with which it is managed, have not unnaturally resulted at times in dissatisfaction on the part of the insured, which has led to a resort to the equitable remedy of accounting. So far there has been a marked difference of

Next to the duty of honestly administering a trust fund is that of keeping a true, honest and intelligent account of such administration."

1. *Are the Policy-holders Creditors?*—*Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 18 Ins. L. J. 110.

2. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 429; 4 Am. St. Rep. 482.

3. *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; 19 Ins. L. J. 250; *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100.

4. In *Re Order of Fraternal Guardian's Estate* (Pa. 1894), 28 Atl. Rep. 482, the supreme court adopted the opinion of the auditor, who says: "The matured certificate-holders claim to be creditors of the order for the amount of the first payments on their certificates, and, in support of this position, relied upon two cases: *Vanatta v. New Jersey Mut. L. Ins. Co.*, 31 N. J. Eq. 15, and *Mayer v. Atty. Gen'l*, 32 N. J. Eq. 820. While the above appear to be two cases, they are really one, as the same case came twice before the court in settlement of the one insurance

company, and they may, therefore, be considered together. In the settlement of the affairs of the New Jersey Mutual Life Insurance Company, which had become insolvent, there appeared to be three classes of claimants: (1) Endowment policies, that had matured by lapse of time previous to insolvency; (2) policies upon which, before insolvency, all payments had been made that were ever to be made, but the time of maturing the policies did not expire until after insolvency; (3) unmatured policies. In marshaling the assets, the court treated the first-named endowment policy-holder as a creditor, and awarded him payment in full out of the assets, on the ground that he had terminated his membership, and become a creditor; the other two policy-holders came in afterwards, *pro rata*. . . . The certificate-holder here was a member for twenty-eight years. He was still a member after his first installment became due, and he was bound to pay further assessments, and continue to take part in the management of the order. The auditor cannot bring this case within the ruling of *Mayer v. Atty. Gen'l*, 32 N. J. Eq. 820."

opinion as to granting the remedy. The courts of *New York* have refused it to the Tontine policy-holder, on the ground that he is a mere general creditor of the company.¹ So in the federal courts,² and in the province of *Ontario*,³ the division of the Tontine fund is viewed as a matter which rests largely in the discretion of the company's managers, and with which the courts will not interfere by compelling an accounting.

On the other hand, it is held in *Massachusetts* that the holder of such a policy is entitled to an accounting, not on the ground that he is a *cestui que trust*, and the insurer a technical fiduciary,⁴

1. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421; 4 Am. St. Rep. 482, *distinguishing* and *overruling* the *dictum* in *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328. In the case first cited, the court said: "We think the payment of a premium by the policy-holders of this class of policies is much more like that of a deposit in a bank by a depositor, as to which it is conceded there is no such relation of trustee and *cestui que trust*. (See *Foley v. Hill*, 2 H. of L. Cas. 28, 32.) By the very terms of this policy, the amount of the fund is necessarily uncertain. What it may be depends, not only upon the number of policies taken out during the period, but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund; so that the dividend which may come to the plaintiff or any other policy-holder depends upon numerous contingencies, and in relation to all these matters the parties have agreed, in specific terms, contained in the policy itself, that this surplus or fund, derived as already stated, 'shall be apportioned equally among such policies of the same class as shall complete their ten-year dividend period.' Here is the extent of the obligation of the defendant—that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is, in reality, no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the Tontine period. There is no separation of the fund belonging to this system, and no legal necessity for such separation from any other fund or property belonging to the defendant. The situa-

tion of the parties is that of a debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment which, taking the language of the policy into consideration, necessarily means that the appointment (apportionment) is to be made by the corporation through its officers."

2. *Hunt v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100.

3. *Bain v. Aetna L. Ins. Co.*, 20 Ont. 6.

4. In *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110, the court, by Devens, J., observes: "It is said that the plaintiff has a sufficient remedy at common law; that he can bring his action at law; and that, upon proper interrogatories addressed to the defendant, all the information necessary for the proper adjustment of the account may be obtained. But even if an action at law could be maintained, where an account is complicated so that a full examination and settlement of previous accounts, transactions, or methods of business are necessary, and where the whole matter is entirely within the knowledge of the defendant, it cannot so conveniently or accurately be investigated at common law as in equity. . . . That the accounts are singularly complicated, and that the method by which the value of the shares of the plaintiff which he has obtained by full payment of his premiums and completion of his Tontine period is ascertained, is one of much complexity and difficulty in its application, appears from the evidence reported. A court of equity is the appropriate tribunal for dealing with such an account, and the defendant is fairly bound to produce an account from the data in its possession which shall show that it has complied with its promise equitably to

but by virtue of the general jurisdiction over accounts conferred on courts of equity by the statute of that state.¹ It is noticeable however, that the *United States* court, in accordance with the rule above indicated, though sitting in *Massachusetts*, and construing the same statute, refuses to allow an accounting.² In *Illinois*, the supreme court, while not passing specifically upon the right to an accounting, holds that the officers of the company are trustees of the Tontine fund,³ and this doctrine would seem to include the right of the insured to compel them to account for its administration.

2. Reformation of Policy.—The reluctance of the court of *New York* to interfere with the management of the Tontine fund, is shown not only in suits for an accounting, but also in applications to reform Tontine policies. That the insured was induced to enter into his contract by representations that his share in the fund, at the end of the Tontine period, would be much larger than it proved, has been regarded as insufficient to entitle the beneficiary to a reformation of the policy.⁴

apportion to the plaintiff his share in the accumulations made through the operation of the Tontine provisions in his policy."

1. *Massachusetts* Pub. Stat., ch. 152, § 2, cl. 10, which confers such jurisdiction "where the nature of an account is such that it cannot be conveniently and properly adjusted in an action at law."

2. See cases cited in note 2, p. 66.

3. See *supra*, this title, *The Status of Policy-holders*.

4. *Avery v. Equitable L. Assur. Assoc.*, 117 N. Y. 451; 19 Ins. L. J. 250; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150. In the former case the complaint alleged that it was agreed that the insured might withdraw, at the end of the Tontine period, the sum of \$7,170, and referred to an attached memorandum given to the insured, which named this sum as one of the "Estimated Results." It was also alleged that the company had refused to pay this sum and had allowed only \$5,076.80. Plaintiff prayed for such a reformation of the contract as would insert the sum of \$7,170 as a substitute for the Tontine clause, which provided that the insured might withdraw "the policy's entire share of the assets." The court, after discussing the general principles upon which contracts may be reformed, says: "Does the plaintiff make out an equitable case for the interference of the court? I am unable to say that she

does. We must consider the question as affected by the incorporation of the contract in the plaintiff's complaint. She does not pretend that any fraud or any imposition was practised upon her, by which she was induced to accept the policy, nor that there was any fraudulent suppression or omission of any part of their agreements. She does not show that there was some mistake in the contract of assurance, which was mutual or which resulted in mutual error. Her whole subject of complaint is that the defendant's representation as to the sum payable in a certain contingency was not contained as an agreement of the policy. But is that a well-founded basis of complaint on her part? What was solicited of her husband to take out, and what he agreed to and did accept, was a peculiar form of policy, differing from the plain and ordinary contract of life assurance, under which the defendant would become liable for a certain sum, and only upon the death of the assured. Under the policy negotiated for, if the assured survived the stated period of fifteen years, the sum he might elect to receive in cash was, in its nature, uncertain, and, in the nature of things, incapable of being exactly computed in advance. This appears from the language of the policy itself, which describes it as issued under the Tontine savings fund plan, and indicates its speculative possibilities, in declaring it entitled to an equitable apportionment,

3. **Assignment of Policy.**—The right of the assured to assign his policy so as to confer upon another the power to receive the full benefit of its provisions, is not so extensive as in the case of most other contracts, for the parties in interest in the modern life-insurance policy, as a rule, include not only insurer and insured, but the beneficiary as well. The latter is usually¹ regarded as having a vested right in the contract, such as no assignment can impair.² So the insured in a Tontine policy, where the beneficiaries pay the premiums, cannot assign it so as to affect the right of the latter, even though it provides that the surplus dividends, if any, shall be payable to the insured "or assigns."³ Of late, however, policies are often made payable to the insured's estate, and where such is the case, a Tontine assignment of the same to a fiducial agency is valid, and payment to the latter is a good defense to an action by the administrator.⁴

with other like policies, of the surplus or profits derived from such policies in the class as shall cease before the completion of their respective Tontine dividend periods. The plaintiff expressly alleges that such was agreed upon as the policy, and the memorandum which she rests upon as presenting what was to be the defendant's agreement of assurance, describes the proposed policy as of that nature." Then, as to the legal effect of the estimates, it is further observed: "I think we may assume that the defendant's officers made these estimates as liberal as it was possible, and that they represented the chances in as favorable a light as they could. That is quite possible and probable; but that assumption would not affect the question. The results of such a plan of assurance were matters of opinion, and they are not considered as important in equity. The avenues of inquiry were equally open to the parties, and probably the experience of the officers was of more use to them than to the general public. Their statements of what the assured might possibly gain under that plan do not amount to misrepresentation; and if the assured accepted the policy relying upon them, and the result is not as supposed or estimated, that presents no ground for relief. It was, and in the very nature of the plan could only be, problematical or speculative. The figuring out of the chances of the assured, in the chances of all of his class, could only be based on hypothetical facts and figures."

1. But not always. There is some

conflict in the authorities, but the weight is strongly in favor of the rule stated in the text. See Cooke on Life Insurance, pp. 123-126, and notes.

2. In *Washington Central Bank v. Hume*, 128 U. S. 105, the court, by Fuller, C. J., said: "It is indeed the general rule that a policy and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named," citing *Bliss on Life Ins.* (2d ed.), p. 517; *Glanz v. Gloeckler*, 10 Ill. App. 484; 104 Ill. 573; *Wilburn v. Wilburn*, 83 Ind. 55; *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 193; 38 Am. Rep. 289; *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419; 4 Am. Rep. 328; *Gould v. Emerson*, 99 Mass. 154; 96 Am. Dec. 720; *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157.

3. *Ferdon v. Canfield*, 104 N. Y. 143; 17 Ins. L. J. 73, holding also that although the title of defendants, who were claiming as assignees of the beneficiaries, might be incomplete, the plaintiffs were not bettered thereby.

4. In *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, the arrangement involved a new application of the Tontine plan. It appears to have been in the usual form of certificates of membership in mutual benefit societies. The Tontine provisions were supplied by a separate instrument, assigning the certificate to the fiducial agency which was described as the trustee and assignee of the

TOOK.—See note 1.

TOOLS.—(See EXECUTIONS, vol. 7, p. 135; STATUTES, vol. 23, p. 399).—The word comprehends, in its general acceptation, instruments and implements of manual operation, particularly such as are used by mechanics and farmers.² But the word, as used in exemption laws, is not confined to such instruments as are actually used with the tradesman's own hands.³ Nor, when tools necessary for the prosecution of a trade or occupation are exempted, will the exemption be confined to those only which are absolutely necessary, but may include those of an expensive and improved character.⁴ Yet, on the other hand, the most liberal

holders of ten such certificates. These constituted the Tontine class, the survivors of which were to share the profits from the ten certificates. The court also held that the arrangement was lawful and was not a gambling contract.

1. In *Harrison v. Manship*, 120 Ind. 43, a complaint charging that the defendant "took and drove off my ducks and sold them" without a colloquium or innuendo, was held to state no cause of action. But in *Stringham v. Cook*, 75 Wis. 589, it was held that a complaint alleging that the defendant wrongfully "took" timber from the lands, was a substantial charge of "wrongful cutting."

2. *Lovewell v. Westchester F. Ins. Co.*, 124 Mass. 418; *Oliver v. White*, 18 S. Car. 235.

In *State v. Zaddock*, 6 Vt. 594, it was held that the crucible was not a tool or instrument, under a statute of the *United States* making it a criminal offense for one to have in his possession any dye, stamp, or instrument or tool . . . for the purpose of forging or counterfeiting.

In a Policy of Insurance—Patterns.—Patterns used in manufacturing are included within the meaning of the word "tools," used in an insurance policy insuring fixed and movable machinery, engines, lathes, and tools. *Lovewell v. Westchester Ins. Co.*, 124 Mass. 418. So a policy of insurance on "tools used in the manufacture of boots and shoes," covers patterns for making boots and shoes. *Adams v. New York, etc., Ins. Co.* (Iowa, 1892), 51 N. W. Rep. 1149.

3. In *Howard v. Williams*, 2 Pick. (Mass.) 83, Lincoln, J., in reference to the statute exempting tools, said: "The design and effect of the law are to secure to handicraftsmen the means by which they are accustomed to obtain

subsistence in their respective occupations. The exemption is not limited merely to the tools used by the tradesman with his own hands, but comprise such in character and amount as are necessary to enable him to prosecute his appropriate office in a convenient and usual manner, and the only rule by which it can be restricted is that of good sense and discretion in reference to the circumstances of each particular case. It would be too narrow a construction of a humane and beneficial statute to deny to tradesmen, whose occupation can hardly be prosecuted at all, much less to any profitable end, without the aid of assistance, as journeymen and apprentices, as a necessary means of their employment."

So in *Daniels v. Hayward*, 5 Allen (Mass.) 43, it was held that machines of simple construction, moved by the hand or foot, used in the manufacture of boots, were exempt, although the owner employed a number of men under him, by whom the machines were used.

But where the owner of tools is not a tradesman, and does not use them himself, but employs others to work for him, the tools are not exempt. *Abercrombie v. Alderson*, 9 Ala. 681.

4. *Seeley v. Gwillim*, 40 Conn. 106; *Caswell v. Keeth*, 12 Gray (Mass.) 351.

In *Healey v. Bateman*, 2 R. I. 454, it was said that it certainly could not have been intended that the term "tools necessary for his usual occupation" should be understood to mean those of absolute necessity; namely, those without which the debtor could not prosecute his work at all, but such as are reasonably necessary for the prosecution of it advantageously and usefully. Any other construction would be very little protection, since any mechanic may in some way go on with his work with a

definition of the words "working tools" will not include complicated machinery.¹ So the simple instruments used in husbandry may properly come within the exemption,² but not a threshing machine.³

For numerous illustrations of what have been held to be within the meaning of working tools, implements, etc., as used in exemption laws, see note 4.

very much smaller amount of tools than are supposed to be necessary for doing his work to advantage.

1. *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodward*, 10 Pick. (Mass.) 143; *Ford v. Johnson*, 24 Barb. (N. Y.) 34; *Boston Belting Co. v. Ivens*, 28 La. Ann. 596; *Knox v. Chadbourne*, 28 Me. 160; 48 Am. Dec. 487.

In *Buckingham v. Billings*, 13 Mass. 82, the court said that the statute exempting tools should be understood to designate those simple instruments which are commonly used by the hand of man in some manual labor necessary for his subsistence, and not complicated machinery and expensive utensils which might be of great value. But see *Patton v. Shepard*, 4 Conn. 450.

In *Batchelder v. Shapleigh*, 1 Fairf. (Me.) 135, a mill saw was held not to be a tool. And in *Kilburn v. Demming*, 2 Vt. 404, an instrument called a "billy and jenny," used for spinning and manufacturing cloth, was held not a tool.

In *Sylvester v. Seymour*, 35 Vt. 427, a machine for shaving and splitting leather operated either by hand or steam, was held not to be exempt from attachment as a tool necessary for upholding life.

The printing or stamping block of a painter of oilcloths of an expensive kind, used in the business requiring extensive buildings and numerous workmen, are not necessary tools to the tradesman. *Riche v. McCauley*, 4 Pa. St. 471.

A gin and grist mill, are not exempt as tools. *Cullers v. James*, 66 Tex. 494; nor a weaver's loom. *McDowell v. Shotwell*, 2 Whart. (Pa.) 26.

In *Seeley v. Gwillim*, 40 Conn. 160, where a debtor carried on the business of bookbinding and manufacturing blank books with the assistance of several employes, and for the purpose had sundry machines, all of which were operated by hand, and all of which, as well as the tools, would have been needed if he had done the work alone, it was held that the machines were not exempt, although the tools were.

2. *Pierce v. Gray*, 7 Gray (Mass.) 67; *Wilkinson v. Alley*, 45 N. H. 551. A farmer's plow, cart-wheels and rigging, harrow, drags, etc., have been held to be tools. *Wilkinson v. Alley*, 45 N. H. 551. But see *Dailey v. May*, 5 Mass. 313.

In the *Vermont* statute exempting "such tools as may be necessary for upholding life," the word "tools" has been held to extend to such farming tools as are used by hand and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, and other tools of a like character; but does not include machinery or implements used by oxen and horses, as carts, plows, harrows, mowers and reapers. The court said: "We think this a sound, reasonable construction of the statute, and we see no reason why one who carries on farming to any extent should not have such simple mechanical tools exempt from attachment as are indispensable for repairing farming implements, and which he procures for his own use, and which he in fact uses as much as a mechanic. He is, or may be compelled to perform such mechanical work in order to get along with his ordinary farming operations, and if so, he must have the tools and should hold them exempt from execution." *Garrett v. Patchin*, 29 Vt. 248; 70 Am. Dec. 414.

3. *Myer v. Myer*, 23 Iowa 359; *Ford v. Johnson*, 24 Barb. (N. Y.) 364.

4. **Musical Instruments.**—It has been held that the piano of a music teacher, used in her profession or business, is an implement, and exempt. *Amend v. Murphy*, 69 Ill. 337. So, a violin and bow of a musician. *Goddard v. Chaffee*, 2 Allen (Mass.) 395. So, also, a cornet. *Baker v. Willis*, 123 Mass. 95; 25 Am. Rep. 61.

Watches.—Where a watch was hung up for use in a house, the family having no clock, whose daily avocations were such in nature that a timepiece was indispensable, it was included within the term working tools in *Bitting v. Vanderburg*, 17 How. Pr. (N. Y.) 80. But in *Rothschild v. Boelter*, 18

The tools of one who abandons his trade are no longer exempt.¹ A mere suspension of operation, however, does not constitute such an abandonment as will render them liable to execution.²

Minn. 361, it was held that the watch of a cigar-maker, used by him to time his workmen, was not exempt as an instrument used for the purpose of carrying on his trade. "His workmen could make as many, and as good cigars, if he were to keep their time and 'regulate his duties,' whatever that may mean, by the sun."

Dentists' tools come within the meaning of mechanical tools. "A dentist, in one sense, is a professional man, while in another sense his calling is made mechanical, and the tools he employs are used in mechanical operations." *Maxon v. Perrott*, 17 Mich. 342. See also *Duporron v. Communi*, 6 La. Ann. 789. But see *Whitcomb v. Reed*, 31 Miss. 567, where it was held that dentistry was not a trade, nor a dentist a mechanic.

Miscellaneous.—A hunter's gun has been regarded as a tool, *Choate v. Redding*, 18 Tex. 581; also a fisherman's net and boat, *Sammis v. Smith*, 1 Thomp. & C. (N. Y.) 444; a canal boatman's towline has been exempted as a working tool, *Fields v. Moul*, 15 Abb. Pr. (N. Y.) 6; a barber's chair and foot-rests, are tools. *Allen v. Thompson*, 45 Vt. 472.

The abstracts, a cabinet, and a table of an abstractor of titles, have been held to be tools and instruments exempt from execution. *Davidson v. Sechrist*, 28 Kan. 232.

Cheese vats, presses, and knives of a person engaged in making cheese, have been held exempt from execution. *Fish v. Street*, 27 Kan. 270.

The surgical instruments of a physician have been held to be exempt as his tools. *Robinson's Case*, 3 Abb. Pr. (N. Y.) 416. And so the office furniture of a practicing lawyer. *Abraham v. Davenport*, 73 Iowa 111. But a lawyer's library was not exempt under a statute exempting "the common tools of a man's trade." *Lenoir v. Weeks*, 20 Ga. 596.

Shop or Building.—In *Holden v. Stranahan*, 48 Iowa 70, it was held that the building in which a photographer or mechanic carries on his business, even though it be personal property, is not exempt from execution as tools.

1. *Willis v. Morris*, 66 Tex. 629;

Norris v. Hoyt, 18 N. H. 196; *Davis v. Wood*, 7 Mo. 196. See also *Miller v. Menke*, 56 Tex. 539; *McDonald v. Campbell*, 37 Tex. 614. See *EXECUTIONS*, vol. 7, p. 135.

2. *Harris v. Hayne*, 30 Mich. 140.

In *Caswell v. Keath*, 12 Gray (Mass.) 352, it was said that, "The distinction between withdrawing from the pursuit of a particular trade or occupation, with the determination never to resume it, and a temporary diversion from its prosecution, while engaged in conducting some other business or enterprise not intended to be of permanent or durable continuance, is clear and definite. . . . To secure to himself the privileges and benefits intended to be conferred by the provisions of the statute, an artisan is not required to ply his trade without any possible intermission or the occurrence of any interruption in its pursuit. If, for instance, owing to the general stagnation of business, he cannot, for a season, find remunerative employment in carrying it on, or if, from personal infirmity or other intervening impediment, it becomes necessary or expedient that he should resort temporarily to some other department of industry to obtain means of supporting himself and his family, he cannot, as long as he entertains an intention to return, as soon as circumstances will permit, to occupation and employment in his trade, be said to have given up or abandoned it. The tools and instruments requisite to carry it on in the usual and ordinary manner in which such business is conducted are, in the meantime, still things of necessity to him within the meaning of the law." The court further says that the provisions of all the statutes upon this subject are intended for the relief and benefit of persons possessed of little property, and dependent upon their daily labor, or the moderate income derived from their usual and ordinary avocations, and should be so interpreted as to effectuate this obvious purpose of their enactment.

A carpenter who enlisted as a volunteer in time of war does not so abandon his trade as to render the tools thereof liable to seizure under execution. *Abrams v. Pender*, Busb. (N. Car.) 260.

TORTS.

- I. Definition, 72.
- II. Distinguished from Contracts and Crimes, 72
- III. Persons Liable for Torts, 75.
 - 1. *For Their Own Torts*, 75.
 - 2. *For the Torts of Others*, 75.
- IV. Wrongs Affecting Personal Safety and Security, 76.
 - 1. *Assault and Battery*, 76.
 - 2. *False Imprisonment*, 76.
 - 3. *Malicious Prosecution*, 76.
- V. Libel and Slander, 76.
- VI. Deceit, 77.
- VII. Wrongs Affecting Domestic Relations, 77.
 - 1. *Of Husband and Wife*, 77.
- 2. *Of Parent and Child*, 77.
- 3. *Of Guardian and Ward*, 77.
- 4. *Of Master and Servant*, 77.
- VIII. Injuries to Real Property, 77.
- IX. Injuries to Personal Property, 78.
- X. Wrongs Affecting Easements, 78.
- XI. Infringements of Copy rights, Patents, and Trade-marks, 78.
- XII. Violation of Water Rights, 78.
- XIII. Damage by Animals, 78.
- XIV. Escape of Dangerous Substances, 78.
- XV. Nuisances, 78.
- XVI. Negligence, 79.

I. DEFINITION.—"The word tort means nearly the same thing as the expression civil wrong. It denotes an injury inflicted otherwise than by mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract had established between the parties."¹

II. DISTINGUISHED FROM CONTRACTS AND CRIMES.—A tort may be distinguished from a contract, in that a contract involves the agreement of at least two parties, whereas a tort, as such, involves no agreement.² Persons jointly committing torts are, as a rule, severally liable without any right of contribution from each other.³ In many cases, persons under disability to make contracts are nevertheless liable for their torts;⁴ and at common law

1. Bish. on Non-contract Law, § 4. The author adds: "Of course the wrong must be of a sort which the law redresses; not a mere infraction of good morals."

"The word torts is used to describe that branch of the law which treats of the redress of injuries which are neither crimes nor rights from the breach of contracts. All acts or omissions of which the law takes cognizance may in general be classed under the three heads of contracts, torts, and crimes. Contracts include agreements, and the injuries resulting from their breach. Torts include injuries to individuals; and crimes, injuries to the public or the state." Bouv. L. Dict., *tit.* "Torts;" 1 Hill on Torts, 1.

"A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract." Pollock on Torts, 4.

"In general it may be said, that whenever the law creates a right, the violation of such right will be a tort; and wherever the law creates a duty, the breach of such duty, coupled with consequent damage, will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute." Bouv. L. Dict., *tit.* "Torts."

Scope of this Title.—As the whole law of torts has been treated, or will be treated, in various titles throughout this work, it is deemed unnecessary to attempt a comprehensive treatment of the subject here. But it is believed that an analysis, accompanied by specific cross-references to other titles where the law will be found, will be helpful to those who consult this title.

2. See CONTRACTS, vol. 3, p. 823. See also Pollock on Torts, p. 1.

3. CONTRIBUTION, vol. 4, p. 12.

4. CONTRACT, vol. 3, p. 862; IN-

the death of either party destroys the right of action for a tort.¹ The line of demarkation between contracts and torts is not, however, perfectly defined. Many torts arise out of a state of facts which constitutes also a breach of contract, and in that event, the injured party may elect to bring his action either *ex contractu* or *ex delicto*.² Again, there are cases in which a tort may be so committed as to give rise to an implied contract; as where one wrongfully disposes of the property of another and receives the consideration therefor. In such cases the injured party may waive the tort, and sue on the contract for the consideration received by the wrongdoer.³

So, too, the same state of facts may constitute a crime for which the offender may be prosecuted at the suit of the public or state, and a tort for which the injured party may maintain a civil action for damages.⁴

It was once supposed to be the law in *England*, that if the crime amounted to a felony, the injured party's civil remedy was merged in the felony,⁵ but it has long been settled that in such

FANTS, vol. 10, p. 668; MARRIED WOMEN, vol. 14, pp. 604, 647; INSANITY, vol. 11, pp. 132, 144.

1. See SURVIVAL OF ACTIONS, vol. 24, p. 1027.

2. ELECTION, vol. 6, p. 247.

Judge Cooley says: "It is customary in the law to arrange the wrongs for which individuals may demand legal redress, into two classes: the first embracing those which consist in a mere breach of contract, and the second those which arise independent of contract. The classification is not very accurate. Many cases exist where the complaining party may, on the same state of facts, at his option, count upon a breach of contract as his grievance, or complain of a wrong in a manner which puts the contract out of view. Imperfect as it is, however, the classification has been found sufficient for judicial purposes. And where forms of action have been abolished by statute, the old distinctions are still kept in view in giving redress, and while thus the common law classified wrongs, it appropriated the generic term to one class of wrongs only. Breaches of contract were mere failures to perform agreements, and the actions for redress in the courts of law were actions on contracts, or actions *ex contractu*. Other acts or omissions giving rise to a suit at law were called specifically, wrongs or torts, and the actions by which redress was to be obtained, were called actions for torts, or

actions *ex delicto*." Cooley on Torts (2d ed.) 2.

3. ASSUMPSIT, vol. 1, p. 888; ELECTION, vol. 6, p. 247.

4. 3 Bl. Com. 122.

"The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: That private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals merely as individuals. Public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." 4 Bl. Com. 5.

Judge Cooley says: "Certain acts or omissions are made public offenses by the common law or by statute, either because their inherent qualities and necessary tendencies make them prejudicial to organized society, or because it is believed that the evils likely to flow from them will be so serious that the general good will be subserved by forbidding them, and penalties are attached to them, which are imposed on public grounds. These, according to their grade, are crimes or misdemeanors, or they are simply things prohibited under penalty. But where the same wrongful acts cause damage to private individuals, they come directly within the definition of torts, and are such." Cooley on Torts (2d ed.) 84.

5. In *Higgins v. Butcher*, 1 Yelv. 89;

cases, the trial of the civil action may be suspended only until the offender has been prosecuted for the felony.¹ The latter rule has found support in some jurisdictions in the *United States*,² but in others, it is held that the civil remedy is in no way dependent upon the prosecution of the offender to conviction or acquittal.³

1 Brownl. 205, there is the following *dictum* by Tanfield, J., to which Fenner and Yelverton, JJ., are said to have assented: "If a man beats the servant of J. S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of service, because, the servant dying of the battery, it has now become an offense to the crown, being converted into felony, and that drowns the particular offense and private wrong offered to the master before; his action is thereby lost."

1. Crosby v. Leng, 12 East 409; Go-lightly v. Ryn, Lofft. 88; Lutterell v. Reynell, 1 Mod. 282; White v. Spet-tigue, 13 M. & W. 603; Osborn v. Gillett, L. R., 8 Exch. 88; Wells v. Abrahams, L. R., 7 Q. B. 554.

In Crosby v. Leng, 12 East 409, Lord Ellenborough, C. J., said: "The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense; and after a verdict, either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was the proper subject-matter of a criminal prosecution."

2. Hutchison v. Bank of Wheeling, 41 Pa. St. 42; 80 Am. Dec. 596; Foster v. Tucker, 3 Me. 458; 14 Am. Dec. 243; Boody v. Keating, 4 Me. 164; Crowell v. Merrick, 19 Me. 392; Belknap v. Milliken, 23 Me. 381; McGrew v. Cato, 1 Minor (Ala.) 8; Middleton v. Holmes, 3 Port. (Ala.) 424; Blackburn v. Minter, 22 Ala. 613; Martin v. Martin, 25 Ala. 201; Nelson v. Bondurant, 26 Ala. 341; Morton v. Bradley, 27 Ala. 640.

In *Maine*, it has been held, that the rule that a civil action in behalf of the party injured, is suspended until the criminal prosecution has been commenced and disposed of, is limited to larcenies and robberies. Boody v.

Keating, 4 Me. 164; Crowell v. Merrick, 19 Me. 392; Nowlan v. Griffin, 68 Me. 235; 28 Am. Rep. 45. But in that state it has been provided by statute, that an action for the recovery of property stolen, may be maintained by the owner against the person liable therefor, although the thief is not convicted. Rev. Sts. 1883, ch. 120, § 14. See Howe v. Clancey, 53 Me. 130; Carleton v. Lewis, 67 Me. 76.

In Neal v. Farmer, 9 Ga. 559, it was held that in cases of treason, and such crimes as are felonious by the common law, the person injured is not entitled to an action, until the offender is prosecuted to a conviction or acquittal. But in McBain v. Smith, 13 Ga. 315, it was held that one from whom personal property had been stolen in another state, might bring trover for the recovery of the same, before the thief had been prosecuted.

3. Green v. Hudson River R. Co., 28 Barb. (N. Y.) 9, 17; *aff'd* 2 Abb. App. Dec. (N. Y.) 277; White v. Fort, 3 Hawks (N. Car.) 251; Pettingill v. Rideout, 6 N. H. 454; 25 Am. Dec. 473; Quimby v. Blackey, 63 N. H. 77; Boston, etc., R. Co. v. Dana, 1 Gray (Mass.) 83, 96; Hyatt v. Adams, 16 Mich. 180. See also MERGER, vol. 15, p. 358.

In Pettingill v. Rideout, 6 N. H. 454, Richardson, C. J., said: "We are by no means satisfied that the rule is of any practical use in any country. But, however that may be, we are very well satisfied that the people of this state want no additional stimulants to prosecute offenders. Rogues are almost the only game our people have to pursue, and they are by no means backward in that chase. We do not believe that if the civil action and the criminal prosecution go forward together, the public justice will sustain any detriment whatever from that circumstance."

In Quimby v. Blackey, 63 N. H. 77, the court said: "The ancient rule, requiring a criminal prosecution of the offender before allowing a civil action, is not adapted to our situation and circumstances, and has not been adopted in this state. Pettingill v. Rideout, 6

III. PERSONS LIABLE FOR TORTS—1. For Their Own Torts.—As a rule, the personal status of a tort-feasor is immaterial in law in determining his liability, but capacity may be material as a question of fact.¹ Private corporations, as well as natural persons, are liable in damages for their torts,² and the rule, in a modified form, extends even to public corporations.³ Professional men are required to exercise such a degree of care and diligence as prudent men of fair ability in their respective professions would exercise, and for failure to do so, they are liable in damages.⁴ In many cases, public officers are liable for a failure to perform their official duties, and for wrongful acts in excess of their power when damages result therefrom.⁵

2. For the Torts of Others.—A parent may be held liable for the torts of his child, committed in the parent's service, and in doing work authorized or commanded by the parent.⁶ Likewise, the

N. H. 454; 25 Am. Dec. 473; *Hollis v. Davis*, 56 N. H. 74, 85. So far as *Grafton Bank v. Flanders*, 4 N. H. 239, may seem to hold otherwise, it has been overruled by subsequent decisions and universal practice and understanding."

In *Boston, etc., R. Co. v. Dana*, 1 Gray (Mass.) 83, the court, after a careful examination of the authorities on the subject, and the reasons for the rule, said: "There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrained into our jurisprudence."

In *Hyatt v. Adams*, 16 Mich. 188, *Christiancy, J.*, said: "But whatever considerations of public policy may have existed, or may now exist in *England*, requiring the offender to be tried and convicted, or acquitted on the criminal charge, before the civil action is allowed, I do not think that such considerations exist here, or at least to such an extent as to justify the suspension of the civil remedy, and I think the general understanding of the courts and the profession, in this state, has been that the civil remedy was in no way dependent upon the criminal prosecution."

1. As to the liability of infants for their torts, see *INFANTS*, vol. 10, p. 668; as to the liability of married women, see *MARRIED WOMEN*, vol. 14, p. 647; as to the liability of lunatics, see *INSANITY*, vol. 11, p. 144.

2. See *CORPORATIONS*, vol. 4, p. 250; *FOREIGN CORPORATIONS*, vol. 8, p. 369; *GAS COMPANIES*, vol. 8, p. 1273; *RAILROADS*, vol. 19, p. 930, and cross-

references there made; for the wrongful expulsion of passengers for the non-payment of fare, see *RAILROADS*, vol. 19, p. 905, and *STREET RAILWAYS*, vol. 23, p. 1016. See generally, *STREET RAILWAYS*, vol. 23, p. 1004. As to the liability of corporations for libel, see *LIBEL AND SLANDER*, vol. 13, p. 448; for the liability of banks for the wrongful dishonor of checks, see *CHECKS*, vol. 3, p. 225.

3. See *MUNICIPAL CORPORATIONS*, vol. 15, p. 1141; *quasi-corporations*, see *COUNTIES*, vol. 4, p. 364; *TOWNS AND TOWNSHIPS*, vol. 26.

4. For the liability of attorneys, see *ATTORNEY AND CLIENT*, vol. 1, p. 961; for the liability of physicians and surgeons, see *MALPRACTICE*, vol. 14, p. 76. See generally, *NEGLIGENCE*, vol. 16, p. 386.

5. As to the liability of public officers for malicious prosecution, see *MALICIOUS PROSECUTION*, vol. 14, p. 41; for the liability of notaries public, see *NOTARY PUBLIC*, vol. 16, p. 779; for the liability of judicial officers, see *JUDGE*, vol. 12, p. 32; as to the liability of sheriffs, see *SHERIFFS*, vol. 22, p. 529; for the liability of jailers for false imprisonment, see *FALSE IMPRISONMENT*, vol. 7, p. 685; for the liability of military officers for false imprisonment, see *FALSE IMPRISONMENT*, vol. 7, p. 685; and for the liability of such officers for their torts generally, see *MILITARY LAW*, vol. 15, p. 430. See generally, *PUBLIC OFFICERS*, vol. 19, p. 483.

6. See *PARENT AND CHILD*, vol. 17, p. 392, where the subject is thoroughly discussed.

master is liable for the torts of his servant, committed by the latter while acting within the scope of his employment;¹ and a principal may, under similar circumstances, be liable for the torts of his agent.² And on the principle that each partner is the agent of the firm, a partnership is liable for the torts of its members, committed within the scope of their agency.³ At common law, the husband is liable for the torts of his wife.⁴ In some jurisdictions, counties and municipalities are made liable by statute for damages caused within their borders by riotous mobs.⁵

IV. WRONGS AFFECTING PERSONAL SAFETY AND SECURITY—1. **Assault and Battery.**—An attempt to do hurt to the person of another within reach, is an assault, and to strike or touch another in rudeness, anger, negligence, or in the commission of an unlawful act, is a battery. Both of these are personal wrongs for which a civil action will lie.⁶

2. **False Imprisonment.**—The total, or substantially total, restraint of one's freedom of locomotion, by threats or force, without authority of law and against his will, is a tort, for the commission of which the wrongdoer is answerable to the aggrieved party in damages.⁷

3. **Malicious Prosecution.**—One who maliciously institutes a prosecution against another, without a reasonable and probable cause, is guilty of a tort for which the party aggrieved may bring a civil action for damages after the termination of such prosecution.⁸

V. LIBEL AND SLANDER.—"Slander and libel are different names

1. See MASTER AND SERVANT, vol. 14, p. 804.

For the liability of the master for the willful and malicious acts of his servant, see MASTER AND SERVANT, vol. 14, p. 815; for the liability of corporations for the torts of their officers, agents, and servants, see CORPORATIONS, vol. 4, p. 251; MASTER AND SERVANT, vol. 14, p. 813; PUBLIC OFFICERS, vol. 19, p. 514; STREET RAILWAYS, vol. 22, p. 1086 *et seq.*; as to the liability of a master for torts committed by one servant against another, see FELLOW SERVANTS, vol. 7, p. 821.

2. See AGENCY, vol. 1, p. 417.

3. See PARTNERSHIP, vol. 17, p. 1065.

4. See HUSBAND AND WIFE, vol. 9, p. 822.

5. See COUNTIES, vol. 4, p. 368; MUNICIPAL CORPORATIONS, vol. 15, p. 1157.

6. See ASSAULT, vol. 1, p. 778; PRIZE FIGHT, vol. 19, p. 157; PARENT AND CHILD, vol. 17, p. 388; SCHOOLS, vol. 21, p. 767; RECAPTION, vol. 19, p. 1109; MITIGATION OF DAMAGES,

vol. 15, p. 684; SELF-DEFENSE, vol. 21, p. 1058; TRESPASS.

For injuries caused by spring guns and traps, see NUISANCES, vol. 16, p. 957; for liability of corporations, see CORPORATIONS, vol. 4, p. 254; as to administering poison with an intent to injure, see MEDICAL JURISPRUDENCE, vol. 15, p. 251; for joinder of parties plaintiff, see PARTIES TO ACTIONS, vol. 17, p. 601.

7. See FALSE IMPRISONMENT, vol. 7, p. 661; ARREST, vol. 1, p. 750; PUBLIC OFFICERS, vol. 19, p. 516; for the liability of corporations, see CORPORATIONS, vol. 4, p. 254; STREET RAILWAYS, vol. 23, p. 1088.

8. See MALICIOUS PROSECUTION, vol. 14, p. 16; for liability of corporations, see CORPORATIONS, vol. 4, p. 257; for measure of damages, see DAMAGES, vol. 5, p. 48; for joinder of parties plaintiff, see PARTIES TO ACTIONS, vol. 17, p. 601; as to the admissibility of evidence of the bad character of the plaintiff in mitigation of damages, and as tending to show probable cause, see CHARACTER, vol. 3, p. 113.

for the same wrong accomplished in different ways. Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight."¹

VI. DECEIT.²

VII. WRONGS AFFECTING DOMESTIC RELATIONS—1. Of Husband and Wife.³

2. Of Parent and Child.⁴

3. Of Guardian and Ward.⁵

4. Of Master and Servant.⁶

VIII. INJURIES TO REAL PROPERTY.⁷

1. Cooley on Torts (2d ed.) 225. The author adds: "By defamation is understood a false publication calculated to bring one into disrepute." See *LIBEL AND SLANDER*, vol. 13, p. 292; *LIBERTY OF THE PRESS*, vol. 13, p. 510; *MERCANTILE AGENCIES*, vol. 15, p. 280; for slander of title, see *DECEIT*, vol. 5, p. 340; for the measure of damages, see *DAMAGES*, vol. 5, p. 46; as to enjoining the publication of libel and slander, see *INJUNCTIONS*, vol. 10, p. 985; *PATENT LAW*, vol. 18, p. 124; for the joinder of parties plaintiff, see *PARTIES TO ACTIONS*, vol. 17, p. 601; as to pleading the truth of the alleged defamatory language in justification, see *PLEADING*, vol. 18, p. 535; for the rule as to a "reasonable doubt," where the defendant, having charged the plaintiff with the commission of a crime, attempts to justify by proving the truth of the charge, see *REASONABLE DOUBT*, vol. 19, p. 1088; for the validity of contracts to indemnify the publisher of libelous matter, see *INDEMNITY CONTRACTS*, vol. 10, p. 406; as to proving the plaintiff's general bad character in mitigation of damages, see *CHARACTER*, vol. 3, p. 112.

2. For deceit as a cause of action for the recovery of damages, see *DECEIT*, vol. 5, p. 318; *FRAUD*, vol. 8, p. 635; *FRAUDULENT SALES*, vol. 8, p. 786; *PATENT LAW*, vol. 18, p. 142; *WARRANTY*; for the liability of agents for deceit, see *AGENCY*, vol. 1, p. 407; for the liability of the principal for the agent's deceit, see *AGENCY*, vol. 1, p. 417. See also *REPRESENTATIONS*, vol. 21, p. 4; for deceit as a ground for the rescission of contracts, see *RESCISSIION*, vol. 21, pp. 27, 49; for deceit as a defense to bills for specific performance, see *SPECIFIC PERFORMANCE*, vol. 22, p. 1022.

3. For enticing and harboring, see *HUSBAND AND WIFE*, vol. 9, p. 833; for

criminal conversation, see *HUSBAND AND WIFE*, vol. 9, p. 834; *SEDUCTION*, vol. 21, p. 1053; for suits under civil-damage acts, see *HUSBAND AND WIFE*, vol. 9, p. 836; *CIVIL DAMAGE ACTS*, vol. 3, p. 257; for suits for personal injuries to spouse, see *HUSBAND AND WIFE*, vol. 9, p. 832; for wrongfully causing death, see *DEATH*, vol. 5, p. 125; for interference with the right to the custody and burial of the body of a deceased husband or wife, see *DEAD BODY*, vol. 5, p. 115; *CEMETERIES*, vol. 3, p. 51.

The wrongful dissection or mutilation of a dead body, is a tort for which the surviving husband or wife may maintain an action against the wrongdoer. *Larsen v. Chase*, 47 Minn. 307.

4. As to action for injury to child, see *PARENT AND CHILD*, vol. 17, p. 385; for seduction of daughter, see *SEDUCTION*, vol. 21, p. 1009.

5. For guardian's right of action for injuries to his ward, see *GUARDIAN AND WARD*, vol. 9, p. 104.

6. See generally, *MASTER AND SERVANT*, vol. 14, p. 740. For master's right of action for injury to servant, see *MASTER AND SERVANT*, vol. 14, p. 788; for enticing servant away, see *MASTER AND SERVANT*, vol. 14, p. 800; for the malicious procurement of a breach of contract, see *Lumley v. Gye*, 2 El. & Bl. 216; *Big. L'd'g Cas. on Torts*, 306; for servant's right of action for the malicious procurement of his discharge, see *MASTER AND SERVANT*, vol. 14, p. 800. For master's right of action for libel and slander of servant, see *LIBEL AND SLANDER*, vol. 13, p. 451. See also *STRIKES*, vol. 24, p. 123.

7. For trespass upon real property, see *TRESPASS*; for trespass in pursuit of game, see *GAME AND GAME LAWS*, vol. 8, p. 1025; for license in real-estate law, see *LICENSE*, vol. 13, p. 539; as to what constitutes a licensee a tres-

IX. INJURIES TO PERSONAL PROPERTY.¹X. WRONGS AFFECTING EASEMENTS.²XI. INFRINGEMENTS OF COPYRIGHTS, PATENTS, AND TRADE-MARKS.³XII. VIOLATION OF WATER RIGHTS.⁴XIII. DAMAGE BY ANIMALS.⁵XIV. ESCAPE OF DANGEROUS SUBSTANCES.⁶

XV. NUISANCES.—Nuisances are of two classes, viz., private and public. Private nuisances are always torts redressible by a civil action, whereas public nuisances constitute offenses against the public, and the offender therein is liable to indictment. Public nuisances are private nuisances as well, whenever they inflict upon a particular individual any special or peculiar damage.⁷

passer *ab initio*, see TRESPASS; for violations of the rights of support, see LATERAL AND SUBJACENT SUPPORT, vol. 12, p. 933; PARTY WALLS, vol. 18, p. 3; for injuries to the fee by the tenant in possession, see WASTE.

1. See CONVERSION, vol. 4, p. 104; DETINUE, vol. 5, p. 651; REPLEVIN, vol. 20, p. 1041; TROVER; TRESPASS; BAILMENT, vol. 2, p. 40; PLEDGE, vol. 18, p. 585; CARRIERS OF LIVE STOCK, vol. 3, p. 1; LOGS AND LUMBER, vol. 13, pp. 1036, 1047; for confusion of goods, see ACCESSION, vol. 1, p. 54; for wrongful sale of goods under execution, see SHERIFF'S SALES, vol. 22, p. 704; for the officer's liability to the defendant, and justification under process, see SHERIFF'S SALES, vol. 22, p. 703.

2. See EASEMENTS, vol. 6, p. 149; PEWS, vol. 18, p. 421; for obstruction of private ways, see PRIVATE WAYS, vol. 19, p. 111; see also LATERAL AND SUBJACENT SUPPORT, vol. 12, p. 933; PARTY WALLS, vol. 18, p. 3; HIGHWAYS, vol. 9, p. 362; NAVIGABLE WATERS, vol. 16, p. 270; NUISANCES, vol. 16, p. 971; STREETS, vol. 24, p. 1. For pollution of the air by smoke, cinders, etc., see STREET RAILWAYS, vol. 23, p. 1074.

3. For infringements of copyrights, see COPYRIGHT, vol. 4, p. 162; for injunction against such infringement, see INJUNCTIONS, vol. 10, p. 922; for infringement of patents, see INFRINGEMENTS, vol. 10, p. 726; PATENT LAW, vol. 18, p. 70; for injunction against such infringement, see INJUNCTIONS, vol. 10, p. 917; for infringement of trade-marks, see TRADE-MARKS; LABELS, vol. 12, p. 531; for injunction against infringement, see INJUNCTIONS, vol. 10, p. 930.

4. See WATERS AND WATER-COURSES; UNDERGROUND WATERS;

SURFACE WATERS, vol. 24, p. 806; LAKES AND PONDS, vol. 12, p. 628; FLOODS, vol. 8, p. 67; NAVIGABLE WATERS, vol. 16, p. 267; MINES AND MINING CLAIMS, vol. 15, p. 580; MILLS, vol. 15, p. 497; BRIDGES, vol. 2, p. 551; DAM, vol. 4, p. 985; as to draining surface water from one's land, see DRAINS AND SEWERS, vol. 6, p. 15; as to pollution of water by riparian mine owners, see DAMNUM ABSQUE INJURIA, vol. 5, p. 70; as to the reasonable use of water for purposes of irrigation, see IRRIGATION, vol. 11, p. 846.

5. For damages caused by trespassing animals, see ANIMALS, vol. 1, p. 576; DAMAGES, vol. 5, p. 53; as to the effect of statutory requirements concerning fences upon the complaining party's right of action, see FENCES, vol. 7, p. 900; for damages caused by vicious animals, see ANIMALS, vol. 1, p. 581; DAMAGES, vol. 5, p. 61; for owner's liability when diseased animals are allowed to run at large, see ANIMALS, vol. 1, p. 585.

6. As to the liability of gas companies for the escape of gas, see GAS COMPANIES, vol. 8, p. 1273; for explosions of dangerous substances, see EXPLOSIONS, vol. 7, p. 517; as to the escape of water in dangerous quantities from dams and reservoirs, see DAM, vol. 4, p. 979; for escape of fire, see FIRES CAUSED BY OPERATION OF RAILWAYS, vol. 8, p. 1; RAILROADS, vol. 19, p. 890. See also NUISANCES, vol. 16, p. 943.

7. See NUISANCES, vol. 16, p. 922; NAVIGABLE WATERS, vol. 16, p. 267; HIGHWAY, vol. 9, p. 414; STREET RAILWAYS, vol. 23, p. 1069; BRIDGES, vol. 2, p. 550; GAS COMPANIES, vol. 8, p. 1280; LIMITATION OF ACTIONS, vol. 13, pp. 715, 723; LIVERY STABLES, vol. 13, p. 935; MARKETS, vol. 14, p. 461; RAILROADS, vol. 19, p. 921; HEALTH,

XVI. NEGLIGENCE.—Negligence alone is not a cause of action. But there is a great variety of torts wherein one person suffers damage by reason of acts or omissions of another which are not in accordance with the conduct of a reasonably prudent and careful man. In such torts, damage is a necessary element, but negligence is the predominating feature.¹

TORT FEASOR.—A wrongdoer; one who commits, or is guilty of, a tort.²

TORTURE.³—(See also *ANIMALS*, vol. 1, p. 575.)

TOTAL LOSS.—(See *FIRE INSURANCE*, vol. 7, p. 1002; *LOSS*, vol. 13, p. 1052; *MARINE INSURANCE*, vol. 14, p. 385; *NAVIGATION*, vol. 16, p. 355.)

TOUCH AND STAY.⁴—(See also *MARINE INSURANCE*, vol. 14, p. 398.)

vol. 9, p. 318. See also *ABATEMENT*, vol. 1, p. 6.

A municipal corporation is not liable for a failure to abate a nuisance. See *MUNICIPAL CORPORATIONS*, vol. 15, p. 949. As to giving notice before commencing an action, see *DEMAND*, vol. 5, p. 528; for the liability of private corporations and their officers for the maintenance of nuisances, see *OFFICERS*, vol. 17, p. 171.

1. See *NEGLECTANCE*, vol. 16, p. 386; *ACCIDENTS*, vol. 1, p. 82; *ACT OF GOD*, vol. 1, p. 173; *AUCTIONS AND AUCTIONEERS*, vol. 1, p. 980; *ATTORNEY AND CLIENT*, vol. 1, p. 961; *BRIDGES*, vol. 2, p. 562; *COMPARATIVE NEGLIGENCE*, vol. 3, p. 367; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 15; *COUPLING CARS*, vol. 4, p. 417; *CROSSINGS*, vol. 4, p. 906; *DAM*, vol. 4, p. 979; *DRAINS AND SEWERS*, vol. 6, p. 25; *DEATH*, vol. 5, p. 125; *EXPLOSIONS*, vol. 7, p. 517; *FELLOW SERVANTS*, vol. 7, p. 821; *FIRES CAUSED BY THE OPERATION OF RAILWAYS*, vol. 8, p. 1; *HIGHWAY*, vol. 9, p. 376; *INNS AND INN KEEPERS*, vol. 11, p. 49; *LATENT DEFECTS*, vol. 12, p. 910; *LAW OF THE ROAD*, vol. 12, p. 957; *LETTERS*, vol. 13, p. 258; *MALPRACTICE*, vol. 14, p. 76; *MASTER AND SERVANT*, vol. 14, p. 804; *MUNICIPAL CORPORATIONS*, vol. 15, p. 1141; *PILOTS*, vol. 18, p. 455; *STREETS*, vol. 24, p. 1; *STATIONS*, vol. 23, p. 128; *SUNDAY*, vol. 24, p. 528; *TELEGRAPHS AND TELEPHONES*, vol. 25, p. 744; *WAREHOUSES*.

For negligence by carriers, see *CARRIERS OF PASSENGERS*, vol. 2, p. 738; *CARRIERS OF GOODS*, vol. 2, p. 770; *CARRIERS OF LIVE STOCK*, vol. 3, p. 9; *RAILROADS*, vol. 19, p. 903; *STREET RAILWAYS*, vol. 23, p. 1004; *LATERAL*

OR *BRANCH RAILROADS*, vol. 12, p. 948; *SHIPS AND SHIPPING*, vol. 22, p. 752; *EXPRESS COMPANIES*, vol. 7, p. 546; *FERRIES*, vol. 7, p. 947; as to responsibility for collisions on the water, see *NAVIGATION*, vol. 16, p. 337; for negligence in launching vessels, see *NAVIGATION*, vol. 16, p. 347.

2. Bouvier's L. Dict.

3. Under statutes providing that every person who shall maliciously and cruelly maim, beat, or torture any horse, ox, or other cattle, whether belonging to himself or another, shall, on conviction, be adjudged guilty of a misdemeanor, etc., an indictment charging that the defendant did unlawfully and maliciously and cruelly torture, etc., the horses of one Samuel Hearrell . . . by then and there tying brush and boards to the tails of said horses, was held to be insufficient. The court said: "In all acts of this character, the means of producing the torture must be averred, and the court must see that such means have the inevitable act and tendency to produce the effect of which the criminal charge consists. . . . The torture here alluded to must consist of some violent, wanton, and cruel act, necessarily producing pain and suffering to the animal." *State v. Pugh*, 15 Mo. 509.

In the *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y.) 51, it was held that the driving of a horse while ignorant of the fact that it was sick or sore, is not *per se* tormenting or torturing it within the meaning of the act relating to the powers of agents of the American Society for the Prevention of Cruelty to Animals.

4. Under a liberty to touch and stay at all ports for all purposes whatsoever,

TOWAGE; TUGS AND TOWS.—(See CARRIERS OF GOODS, vol. 2, p. 785; MARITIME LIENS, vol. 14, pp. 434, 436; NAVIGABLE WATERS, vol. 16, p. 262; NAVIGATION, vol. 16, pp. 319, 326; SALVAGE, vol. 21, p. 676; SHIPS AND SHIPPING, vol. 22, p. 710.)

- I. Definition, 80.
- II. Tug and Tow One Ship (See NAVIGATION, vol. 16, p. 319), 80.
- III. Towage Converted to Salvage (See SALVAGE, vol. 21, p. 676), 80.
- IV. Contracts of Towage, 80.
 1. *In General*, 80.
 2. *Power of Master to Contract*, 82.
 3. *Contracts Limiting Liability*, 82.
- V. Responsibility of Tug, 82.
 1. *In General*, 82.
 2. *In Making Up Tow*, 83.
 3. *In Navigation*, 84.
 - a. *Abandonment of Tow*, 86.
 - b. *Condition of Weather*, 87.
 4. *As Common Carrier and Insurer*, 88.
5. *For Negligence*, 89.
- VI. Responsibility of Tow, 90.
 1. *In General*, 90.
 2. *Contributory Negligence of Tow*, 91.
- VII. Mutual Responsibility of Tug and Tow, 92.
- VIII. Remuneration for Towage, 92.
 1. *In General*, 92.
 2. *Lien For*, 93.
- IX. Actions for Towage or Damages, 93.
 1. *Jurisdiction*, 93.
 2. *Parties*, 95.
 3. *Lien for Damages*, 95.
 4. *Evidence*, 95.
- X. Measure of Damages, 96.
 1. *For Injuries*, 96.
 2. *For Violation of Towage Contract*, 96.
- XI. Division of Damages, 96.

I. DEFINITION.—The employment of one vessel to expedite the voyage of another vessel, when nothing more is required than the acceleration of her progress, is termed towage.¹

the stay must be for some purpose connected with the furtherance of the adventure, and whether the purpose is within the scope of the policy, is a question for the court. *Longhorn v. Allnutt*, 4 Taunt. 511.

So under a policy of insurance of goods at and from London to any port, or ports in the Baltic, with leave to touch and stay at any ports and places for all purposes whatsoever, the insured may wait at any port for information to what port in the Baltic the ship may safely proceed to discharge her cargo. *Rucker v. Allnutt*, 15 East 278. But in *U. S. v. Shearman, Pet. C. C. (U. S.)* 98, it was held that the liberty in a policy of insurance "to touch" a place, did not justify trading there, and that trading would be a deviation and avoid the policy.

And in *Maryland Ins. Co. v. Leroy*, 7 Cranch (U. S.) 23, where the terms of a policy were "with liberty of touching at the Cape Verde Islands on her outward passage for stock and to take in water," it was said that, "touching, in its nautical sense, is known to be the most restrictive word that can be adopted in such a case. Construing

the license according to the subject-matter, and in its necessary connection with the offer on the freight (in the order of insurance), it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape Verde Islands."

The liberty to touch and stay is always construed to be subordinate to the voyage insured, and to the usual course of that voyage, for purposes connected with it. It does not extend to ports or places opposite to, or wide of, the usual course, or wholly unconnected with the voyage insured. 3 Kent's Com. 315; Emerigon Tom. II., ch. 13, §§ 6, 8; Valin Tom., 2, 78, 79. See also *Hammond v. Reed*, 4 B. & A. 72; *Lolly v. Whitmore*, 5 B. & A. 45.

If there be several ports of discharge mentioned in the policy, and the insured goes to more than one, he must go to them in the order in which they are named, or if not specifically named, he must generally go to them in the geographical order in which they occur. 3 Kent's Com. 315.

1. Century Dict. See also *The H. B. Foster*, Abb. Adm. 222; *The Wil-*

II. TUG AND TOW ONE SHIP.—(See *NAVIGATION*, vol. 16, p. 319.)

III. TOWAGE CONVERTED TO SALVAGE.—(See *SALVAGE*, vol. 21, p. 676.)

IV. CONTRACTS OF TOWAGE—1. In General.—A contract to tow, in law, implies an engagement that each party to the contract will perform his duty in completing it; that proper skill and diligence will be used on board both the vessel and tug, and that neither party, by neglect or mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.¹ Ordinarily it covers merely the furnishing of propelling power to move a boat or vessel from one place to another.² The contract does not constitute a warranty to tow to destination, but an engagement to use best endeavors and competent skill for that purpose with a vessel properly equipped.³ It has been held that where a specified vessel is designated by the towage contract, there is no implied warranty of the vessel's fitness for the service required.⁴

liams, 1 Brown Adm. 218; *The Kelly*, 1 Eng. L. & Eq. 596; *McConnachie v. Kerr*, 9 Fed. Rep. 53; *The Princess Alice*, 3 W. Rob. 140; *The Reward*, 1 W. Rob. 177.

1. *The Julia*, 14 Moo. P. C. C. 210; Lush. 224.

Termination of Contract.—A contract for towing a vessel into a position which would enable her to be beached, does not end when the anchor is cast on her arrival in shoal water, but when her kedge anchor is sent out to haul her stern around to enable her to be properly put aground. *Wilmington Transp. Co. v. The Old Kensington*, 39 Fed. Rep. 496.

Substitution of Tugs.—In order to hold a tug, which took the place of the tug of a railroad company, liable for damages to a tow received after being left at the mouth of a creek, it must be shown that the tug, in some way, made herself a party to the tow's contract with the railroad company to have the barge towed to a point some distance up the creek. *The Mary*, 14 Fed. Rep. 584.

Refusal of Services.—If a tug makes three unsuccessful attempts to heave a line to a schooner, and there is danger of the schooner stranding, she is justified in accepting the services of another tug, and it is the duty of the first tug to get out of the way when requested. *The E. D. Holton*, 55 Fed. Rep. 1010.

Towage and Salvage Service.—The towing of a vessel whose propeller is broken, but who is otherwise in good

condition, is towage, not salvage service. *The Emily B. Souder*, 15 Blatchf. (U. S.) 185.

2. *The Fox*, 15 Fed. Rep. 639.

3. *The Minnehaha*, Lush. 335; 15 Moo. P. C. C. 133; 30 L. J. Adm. 211; 7 Jur. N. S. 1257; 4 L. T. N. S. 810; 9 W. R. 925.

Deviation.—It is no breach of a towage contract for a tug to deviate from its direct course to land a barge, when nothing was said about holding a direct course when the boats were taken in tow. *The Mary McKillop*, 23 Fed. Rep. 829. But in *Phillips v. The Sarah & The Tucker*, 38 Fed. Rep. 252, a tug was held liable for the loss of a barge which sprang a leak and sank while the tug had stopped over night to deliver a cargo. If a tug has more than one vessel in tow, it must not risk the safety of some in order to land one. *White v. The Laverne*, 2 Fed. Rep. 788.

A deviation of three miles in a course of nine, is negligence, although it is foggy and the tidal currents are variable. *The Webb*, 14 Wall. (U. S.) 406.

4. *Robertson v. Amazon Tug & Lighterage Co.*, 7 Q. B. Div. 598.

Towage by Stages.—If a towage contract is to be performed by stages and does not specifically designate the tug to be used, the one towing in the last stage is not liable *in rem* for delays due to default of tugs employed on previous stages. *The E. A. Packer*, 22 Fed. Rep. 668.

2. Power of Master to Contract.—It is not necessary that a master should have express instructions from his owners to tow. He has a general authority to do so,¹ but an agreement, to bind his owners, must be reasonable, and likely to inure to their benefit.²

3. Contracts Limiting Liability.—A special contract that towing shall be done at the risk of the owner of the tow, does not exempt the tug or her owners from liability for loss or injury attributable to negligence.³

V. RESPONSIBILITY OF TUG—1. In General.—It is the duty of those engaged in towage service to see that the tug is properly manned,⁴ and that she is of sufficient power and capacity to tow

1. *The Thetis*, L. R., 2 A. & E. 365; 38 L. J. Adm. 42.

A tug which accepts employment from a person who has no authority to contract, is liable for the loss of the tow, if it is taken through a place obviously unsafe and cut by the ice so as to sink. *The James A. Wright*, 10 Blatchf. (U. S.) 160.

Liability of Master for Injury to Tug.—If the pilot house of a tug is carried away by contact with the anchor fluke of a schooner she is towing, and the master of the tug, who is a member of the corporation owning and operating the tug, admits that the damage was due to his fault, and declares his intention to pay personally for the damage, the promise is made under a valid consideration and is binding. *Gillingham v. Charleston, etc.*, Transp. Co., 40 Fed. Rep. 649.

2. *The Alfred*, 50 L. T. 511; *The Renpor*, 8 Prob. Div. 115.

3. *The Bordentown*, 40 Fed. Rep. 682; *The Syracuse*, 6 Blatchf. (U. S.) 2; *The M. J. Cummings*, 18 Fed. Rep. 178; *Deems v. Albany Canal Line*, 14 Blatchf. (U. S.) 474; *The Rescue*, 24 Fed. Rep. 190; *The James Jackson*, 9 Fed. Rep. 614; *Ulrich v. The Sunbeam*, 1 N. J. L. 141; *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559. *Contra The United Service*, L. R., 9 Prob. Div. 3.

In *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180, the court held that an agreement, whereby the owner of the tow covenanted to have a competent helmsman, a seaworthy boat, and to exempt the tug from all liability, would not excuse the tug if the tow were injured by its negligence. See also *Wooden v. Austin*, 51 Barb. (N. Y.) 9; *Wells v. Steam Nav. Co.*, 8, N. Y. 375.

If a towage contract reads "this boat towed at risk of owners," it means

that the towing company does not assume the liability of common carrier, and does not reduce the liability of the tows from ordinary to gross negligence. *Delaware, etc., Towboat Co. v. Starrs*, 69 Pa. St. 36.

A contract of towage stipulating that it shall be at the risk of the masters and owners of the tow, renders the tug responsible only for the lack of ordinary skill and diligence in her navigation. *The Princeton*, 3 Blatchf. (U. S.) 54. See also *The American Eagle*, 54 Fed. Rep. 1010.

Where the captain of a tow agreed to assume the risk from ice, the tug is not to be held responsible in damages for a mistake of judgment on the part of those in charge, but she is not to be absolved from the duty of exercising reasonable care to avoid unnecessary hazard. *The Packer*, 28 Fed. Rep. 156; *The Syracuse*, 6 Blatchf. (U. S.) 2.

The master of a tug cannot obtain exemption from liability by giving notice at the commencement of a voyage that the towage shall be at the risk of the owner of the tow. *The Vanderslice*, 4 Pa. L. J. 388.

In *Hibernia Ins. Co. v. New Orleans Transp. Co.*, 17 Fed. Rep. 478; *aff'd* 120 U. S. 166, it was held that a clause in a towage contract exempting the tug from liability "from the damages of navigation and other known or unknown obstacles," relieved the tug from damages due to the loss of a barge sunk by running into a tree, recently submerged in the channel by a landslide, if its presence was not known to the pilot.

Burden of Proof.—The burden of proof is on a towboat asserting a special contract that the tow is to be carried at the owner's risk. *The James Jackson*, 9 Fed. Rep. 614.

4. In *The Victor*, 1 Brown Adm. 449, Longyear, J., said: "The responsible

the vessel to the place of destination. They must exercise ordinary skill and prudence in selecting the proper time to make the voyage, keeping in view the craft to be towed, the wind and tide, and other ordinary peculiarities of navigation; ¹ the right and power to determine the proper management and navigation of both tug and tow, and the responsibility for their safety, resting chiefly upon the master of the tug.²

2. In Making Up Tow.—In making up a tow those in charge must act with that reasonable and ordinary care which a prudent man exercises for the preservation of his own property,³ taking care that the tow is properly made up and secured with lines of proper strength.⁴

character of the occupation of tugs requires that there should be some competent person in charge of their navigation, separate and distinct from the wheelsman, and who has no other duties when the tug is in actual service." And in *The Coleman and Foster*, 1 Brown Adm. 456, it was held that proof of a custom for the master to act as helmsman would not be received. See also *The Armstrong*, 1 Brown Adm. 130; *Kenah v. The John Markee*, 3 Fed. Rep. 45.

Liability for Tolls.—A towboat cannot be held liable for tolls except on its own measurement, unless the liability can be shown to exist by an implied or special contract. *The Fox*, 15 Fed. Rep. 639.

1. In *The Merrimac*, 2 Sawy. (U. S.) 586, Deady, J., said: "The master of a tug being a bailee for hire, and, as such, responsible for ordinary skill and diligence in the performance of his contract, what was his duty in the premises? Impliedly he undertook to furnish a tug properly equipped and of sufficient capacity and power to take the scow to the cape, and for the exercise of ordinary skill and prudence in selecting the proper time to make the voyage with reference to the craft to be towed, and the wind and tide, or other ordinary peculiarities of navigation, and in the conduct of the enterprise in case of any unlooked for or extraordinary emergency." See also *Bouker v. Smith*, 40 Fed. Rep. 839; *The Burlington*, 137 U. S. 386; *The Adelia*, 1 Hask. (U. S.) 505.

2. *The Joggin's Raft*, 43 Fed. Rep. 309; *White v. The Lavergne*, 2 Fed. Rep. 788; *The Fannie Tuthill*, 12 Fed. Rep. 446.

The master of the tug is charged with the selection of the route and should

keep in mind the condition of the tug, tow, weather, etc. Where his discretion has been *bona fide* exercised, the tug will not be responsible when it is shown that he acted with reasonable skill and discretion. *The James P. Donaldson*, 19 Fed. Rep. 264. See also *The Brooklyn*, 2 Ben. (U. S.) 547; *Dutton v. The Express*, 3 Cliff. (U. S.) 462; *The Mohawk*, 7 Ben. (U. S.) 139; *The Venture*, 18 Fed. Rep. 462.

If a master of a tug takes the more unsafe of two passages open to him, and after gaining shelter puts out into the open where the tow would be exposed to the heavy sea then running, the tug is liable for loss of a barge by swamping. *The Burlington*, 137 U. S. 386.

3. *The Bordentown*, 40 Fed. Rep. 682.

In getting a vessel out of her berth, stern first, on the New York side, a tug was negligent in imparting to her such headway as carried her to the Brooklyn side, where she hit a pier, before the tug could get to her bow and make a line fast. The failure of the vessel's sailors to catch the line when first thrown from the tug constitutes no defense. *The M. A. Lennox*, 4 Ben. (U. S.) 190.

If a tug assumes entire charge of the operation of getting a vessel out from a pier, it is incumbent on her to adopt a method which will result in no injury to the vessel. *The M. M. Caleb*, 4 Ben. (U. S.) 15.

If the master of a tug fails to make an examination of a brick-laden scow before he takes her in tow, the tug is liable if on the voyage part of the deck-load is lost by her careening. *The Favorite*, 50 Fed. Rep. 569.

4. *The Pres. Briarly*, 24 Fed. Rep. 478; *The Quickstep*, 9 Wall. (U. S.) 665; *The Sweepstakes*, 1 Brown Adm. 509.

A tug is negligent in placing a spile-

3. In Navigation.—A tug undertaking to tow a vessel in navigable waters is bound to know the proper and accustomed water-ways and channel, the depth of the water, the nature and formation of the bottom, whether in its natural state, or as changed by permanent excavations.¹ If a tug is engaged in towing vessels on a river the navigation of which is impeded by bridges, the master is chargeable with notice of the width of his tug and its tow, and must know whether he can run it safely between the bridge piers through which he attempts to pass. He is bound to know the direction of the currents about the piers in the different stages of

driver, which carried no crew and was an unwieldy craft, behind a barge and in such a position that if the backing line of the spile-driver broke, the wind, which was dead astern, would drive her forward into the barge. *Bust v. Cornell Steam Boat Co.*, 24 Fed. Rep. 188.

Where a tow has a long bowsprit, a tug is not negligent in using a hawser of sufficient length to keep the end of the bowsprit forty feet from the stern of the tug. *Gray v. The Jessie Russell*, 5 Fed. Rep. 639.

If the towing hawser is insufficient, and the tow pound, and is so damaged that several boats are sunk, the tug is liable. *The Francis King*, 7 Ben. (U. S.) 11.

Putting a deeply-laden open-decked canal boat in the hawser tier when the wind is blowing from sixteen to twenty-one miles an hour, is negligence. *The Niagara*, 20 Fed. Rep. 152.

If in taking a vessel out from her berth, the tug receives the hail, "all right, go ahead," she is under no obligation to see that all lines on the vessel are cast off, and if a barge made fast to the ship is injured, the tug is not responsible. *The Jack Jewett*, 23 Fed. Rep. 927.

It is negligence to place a barge known to steer wildly in such a position as to interfere with the steering qualities of the tow. *The Orhanovich v. The America*, 4 Fed. Rep. 337.

If the owner of a barge gives notice that a boat is unfit to be placed in the front tier, the tug is bound by the notice, and liable for non-compliance. *The Niagara*, 20 Fed. Rep. 152.

In *Transportation Line v. Hope*, 95 U. S. 297, Hunt, J., said: "When a master of a tug undertakes to transport a barge, he must supply the means for that purpose; he must furnish not only motive power, but he must direct her location, whether on the port or starboard side, whether she should be the

inside boat or the outside one, when and how she should be lashed to other boats, with what fastenings she should be secured as she is dragged through the water, whether she shall go fast or slow, when, if at all, she shall drop astern, when she shall go to harbor, how long remain there, and what shall be the course of navigation."

1. *The Henry Chapel*, 10 Fed. Rep. 777; *The Margaret*, 94 U. S. 494; *The James H. Brewster*, 34 Fed. Rep. 77; *The Effie J. Simmons*, 6 Fed. Rep. 639; *The Robert H. Burnett*, 30 Fed. Rep. 214; *The Delaware*, 20 Fed. Rep. 797.

Shifting Channel.—When a channel is constantly changing or moving, the tug is not bound to know it. *The Mosher*, 4 Biss. (U. S.) 274.

Running a barge upon a sunken pier when the captain knew of the existence of the obstruction, renders the tug liable, and the liability is not affected by the fact that the towage was gratuitous or that the movement of the tug at the critical moment was influenced by the owner of the tow. *The Deer*, 4 Ben. (U. S.) 352. See also *Pettie v. Boston Tow Boat Co.*, 49 Fed. Rep. 464; *The Mascot*, 48 Fed. Rep. 917.

If the persons in charge of the tug have exercised reasonable diligence in familiarizing themselves with all dangerous obstructions, the tug is not liable for injuries received by the tow in running on a concealed snag. *The America*, 6 Ben. (U. S.) 122. See also *The Angelina Corning*, 1 Ben. (U. S.) 109.

If a tug negligently runs aground while towing a barge up a narrow creek, and the towline is cast off by the orders of the tug captain, so that the barge, after her momentum is spent, runs aground and is injured by being left high and dry at low tide, the tug is liable in damages for the consequences of her faulty navigation. *The Vigilant*, 8 Fed. Rep. 921.

water, and to know whether at high water a steamer can pass with its tow over obstructions which in low water would render the passage impossible.¹ If the towage service is performed on waters where the tide ebbs and flows, the master is bound to know the usual course of, and perils due to, the tides.² In towing

If a tow strikes an obstruction, is injured, and the tug is libelled for damages, the discovery, just before the trial, of a rock previously unknown to navigators at the precise spot where the tow was injured, will excuse the tug from liability, it appearing that her pilot pursued the customary course. *The James A. Garfield*, 21 Fed. Rep. 474. See also *The Pierrepont*, 42 Fed. Rep. 687; *The Mary N. Hogan*, 30 Fed. Rep. 927; *reversed* in 35 Fed. Rep. 554.

Leaving Helm to Incompetent Person.—If in navigating a tortuous channel known to be shallow, the master of the tug turns the helm over to an incompetent person simply because he imagines he is familiar with the channel, the tug is liable if she grounds and allows the tow to be delayed and wrecked by an approaching storm. *Bouker v. Smith*, 40 Fed. Rep. 839. As to unskillful pilot, see *The Geo. H. Dentz*, 12 Fed. Rep. 575; *The Frank G. Fowler*, 8 Fed. Rep. 360; *unlicensed pilot*, *The E. M. Norton*, 15 Fed. Rep. 686.

If the pilot engaged by a tug negligently runs a schooner upon a quicksand and she is lost, the tug is liable. *The Martin Klafleisch*, 55 Fed. Rep. 336.

If a tug miscalculates and the hawser kinks, allowing a barge in tow to run against a pier, it appearing that the blow was harder than the usual contacts of navigation, the tug is liable in damages. *O'Neil v. The I. M. North*, 37 Fed. Rep. 270. As to miscalculating tide, see *The Brazos*, 14 Blatchf. (U. S.) 446.

Where a canal boat, while being towed over a perfectly safe and familiar course, hits some obstruction and springs a leak, the burden of proof is upon the tug to account for the injury, or to satisfy the court by a reasonable and consistent account of the trip that she has not failed in her duty to avoid dangerous points, and that the injury arose from no lack of duty, care or skill in her navigation. *The Ellen McGovern*, 27 Fed. Rep. 868; *The Harry and Fred*, 49 Fed. Rep. 681.

Where a tug sheers out of the channel a considerable distance in a short

run, and grounds her tow on a reef, the accident will not be attributed to the landmarks being obscured by a snowstorm, but to the failure of the tug's pilot to proceed under a slow bell, using a good compass. *The Frank G. Fowler*, 8 Fed. Rep. 360; *The Gratitude*, 25 Fed. Rep. 160.

As to defective compass, see *The Webb*, 14 Wall. (U. S.) 406.

If experts differ as to the safer course, the master of the tug is not guilty of negligence in towing boats two abreast instead of in single file through a dangerous place. *Taft v. Carter*, 59 Barb. (N. Y.) 67.

Loading a tug so heavily as to render her unable to give sufficient headway to her tow, renders the tug liable for the loss of the tow if it sheers and strikes on rocks and is lost. *The Geo. Farrell*, 4 Ben. (U. S.) 316; *O'Brien v. New York, etc., Transp. Co.*, 31 Fed. Rep. 494.

1. *The Lady Pike*, 21 Wall. (U. S.) 1; *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *Wilson v. Chicago*, 42 Fed. Rep. 506.

The practice of running canal boats and vessels, whether new or old, against other vessels or piers for the purpose of rapid handling, is dangerous, and when approaching anything like a forcible blow, must be held to be at the risk of those who practice it. *The Syracuse*, 18 Fed. Rep. 828; *The Nebraska*, 2 Ben. (U. S.) 500; *The Harry*, 15 Fed. Rep. 161.

A tug which goes over a dam in order to escape detention at the locks, and injures the tow by running into a bridge pier, is responsible for the injury. *The Venture*, 18 Fed. Rep. 462.

2. *The Delaware*, 20 Fed. Rep. 797.

A tug whose tow is nearly two thousand feet long should get help to prevent the tail of the tow from swinging out of line when a brisk breeze springs up. If the tug fails to do so and a barge at the tail of the tow swings out of line and is injured by running over a channel buoy, the tug is liable. *O'Brien v. New York, etc., Transp. Co.*, 31 Fed. Rep. 494.

If a tug which has her tow com-

vessels without motive power, the tug is regarded as a dominant mind or will in the adventure, and the tow is bound to follow as closely as possible in her wake, and conform to her directions.¹ It is the paramount duty of the tug to consult the safety of her tow and run no avoidable risk.²

α. ABANDONMENT OF TOW.—To justify an abandonment of the tow by a tug, the obstacles in the way of the performance of the towage contract must be at least of an extreme character, if not absolutely insurmountable.³

pletely under control carries it so near a shoal that the swash from a passing vessel, whose coming was seen, coupled with the action of the tide, is sufficient to ground a barge, the tug is liable for the damage sustained. *The Minnie*, 20 Fed. Rep. 543.

If a tug has attached her tow by means of long hawsers, she is guilty of negligence, if, in rounding a dangerous point, the hawsers are allowed to slacken so that the tow by the action of the tide is carried upon rocks and lost. *The C. B. Sanford*, 13 Fed. Rep. 910.

1. *The Fannie Tuthill*, 12 Fed. Rep. 446.

The details of the immediate navigation of the tug, with reference to approaching vessels, must necessarily be left, to a great extent, to those on board of her. *The Civilita and The Restless*, 103 U. S. 699; *Hayes v. Paul*, 51 Pa. St. 134.

Defective Appliance.—If an injury is caused a tow by breaking of the tug's rudder chain, which was defective, and the defect should have been known, the tug is liable. *The M. M. Caleb*, 10 Blatchf. (U. S.) 467, *aff'd* 5 Ben. (U. S.) 163.

2. In *The Delaware*, 12 Fed. Rep. 571, it was held that the paramount duty of a tug was to secure the safety of her tow by any and every means in her power, and to run no avoidable risk, and that the tug would accept at her own peril a risk for any injury that might ensue, to proceed against a strong ebb tide with a certain and obvious danger of her tow's being swung against a steamer at anchor, unless there was no other alternative involving less danger. See also *Gray v. The Jessie Russell*, 5 Fed. Rep. 639; *The Brooklyn*, 2 Ben. (U. S.) 547; *The Baltic*, 2 Ben. (U. S.) 452; *The Lady Franklin*, 2 Low. (U. S.) 220; *The F. W. Vosburgh*, 50 Fed. Rep. 239.

If a towboat voluntarily assumed a needless hazard, and injury to the tow

resulted, she must bear the consequences of the master's temerity. *The Venture*, 18 Fed. Rep. 462.

If a barge is injured by being run against a wharf, a defense by the tug that the barge was old and rotten was unavailable where no reason was given for the blow. *The Workman*, 1 Low. (U. S.) 504.

If a barge, while being towed around the Battery, roll badly and lose part of her deckload and sink, the tug will be held liable if it appear that she did not slacken her speed, and that no attention was paid to the probable effect on the tow. *The Trojan*, 8 Ben. (U. S.) 498.

If a tug without authority adopts the dangerous manœuvre and puts the pilot on the tow in a situation *in extremis*, even if the pilot makes an error of judgment in not acquiescing instantly and without protest, it is not his legal fault. The fault belongs to the party who wrongfully brings the other into that situation. *The Elizabeth Jones*, 112 U. S. 514; *The Bywell Castle*, 4 Prob. Div. 219; *The Strathay*, 27 Fed. Rep. 562; *The Gorgas*, 10 Ben. (U. S.) 541; *The Fannie Tuthill*, 12 Fed. Rep. 446.

It is negligence for a tug to tow a lighter through the swells of a passing steamboat at such a rate of speed as would cause the lighter to ship water. *The J. J. Driscoll*, 27 Fed. Rep. 521.

If the captain of a tug sees his tow steering directly into danger, he must warn her against it. *The Atlas*, 12 Fed. Rep. 798.

A tug must keep far enough away from a lee shore to enable her to turn to windward without stranding the tail of her tow. *The Elfinmere*, 39 Fed. Rep. 909. As to keeping far enough off shore to prevent a tow from grounding, see *The Atlas*, 12 Fed. Rep. 798.

3. While a tug which abandons its tow is bound to show a sufficient excuse

6. CONDITION OF WEATHER.—A tug is not liable for a tow wrecked by sudden squalls, or rapidly approaching storms when, at the time of starting, the weather was fair and there was no indication of approaching atmospheric disturbances.¹

for the abandonment, yet, if during a storm, the towline parts and the tug is not able to find the tow, the tug is excused from liability. *The Clematis*, 1 Brown Adm. 499.

If a sudden squall comes up and it is necessary to drop the tow astern, and the persons in charge of the tow refuse to remain on board to steer for fear of being washed overboard, and it is impossible to handle the tow without a helmsman, the tug is not liable for their loss by being turned adrift, when it appears that she was reasonably adapted for the purpose of towing on the route she was engaged upon. *The Allie & Evie*, 24 Fed. Rep. 745. See also *The Royal v. The Challenger* (V. A. C. 1888), 14 Q. L. R. 135.

The master of a tug is not guilty of negligence in cutting a tow adrift after signaling it, when tug and tow are in danger of being driven on a lee shore by a fierce storm. *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671.

To leave a tow unattended in a harbor unsafe in a storm from one quarter, is negligence. *Connolly v. Ross*, 11 Fed. Rep. 342; *The Charles Runyon*, 46 Fed. Rep. 813; *The Battler*, 55 Fed. Rep. 1006. But it is not negligence to temporarily leave a tow moored to a platform to search for another tow which has been carried adrift by an extraordinary storm. *The Mechanic*, 9 Fed. Rep. 526.

It is not negligence for the master of a tug to leave a tow in a safe place. *The P. C. Shultz*, 10 Ben. (U. S.) 536.

If a tug intends to cast off her lines, she must give notice to the tow and must allow sufficient time to elapse before doing so to enable the tow to take measures for her safety. The failure of the tug to do so constitutes a breach of the duty owed by tug to tow. *The A. M. Ball*, 43 Fed. Rep. 170.

Tying up tows to a river bank, leaving them without lines or watchman, renders the tug liable for their loss by breaking adrift, and the custom of tugmen to act in such a manner will not lessen its liability. *The American Eagle*, 54 Fed. Rep. 1010.

If a tug is engaged to tow a vessel to sea, and on the way out there is a dispute as to the amount to be paid, and

the master of the tug casts off the towline, and the vessel, though using every effort, is carried by wind and tide against docks and injured, the tug is liable. *The A. M. Ball*, 43 Fed. Rep. 170.

For a tug under contract to tow a raft to its destination, to leave its tow *en route* and not wait to see if it has the means to stop and make fast, is negligence. *The Henry Buck*, 38 Fed. Rep. 611.

Leaving a tow at the mouth of a creek under a promise to return the next day, and failing to do so, is such an abandonment as renders a tug liable for the loss of the barge during her absence by the ice driving against her sides, cutting them so she sinks. *Cokeley v. The Snap*, 24 Fed. Rep. 504.

If a tug engaged in towing scows to sea loses one of them by the bits pulling out, and the water is shoal, and it is dangerous to make an attempt to pick her up, the tug is not guilty of negligence in first taking the barges in tow to a safe place and then returning and finding the barge which broke loose at anchor, and, if it was impossible to approach her on account of the sea, in returning to her owners and reporting her condition as soon as possible. *The R. C. Veit*, 56 Fed. Rep. 122.

1. Where the atmospheric conditions at the time of sailing showed no indication of an approaching squall, a tug is not liable for boats swamped by high seas encountered during the voyage. *The Geo. L. Garlick*, 16 Fed. Rep. 704; *The Mechanic*, 9 Fed. Rep. 526.

In the absence of all other indications of probable bad weather, short towing trips are not to be condemned, even if the barometer is low, though rising, and cautionary signals are displayed. *The Allie & Evie*, 24 Fed. Rep. 745.

A tug may, without fault, take a coal-laden barge, the sides eighteen inches from the water, around the Battery and under the lee of Manhattan Island, when the wind is blowing twenty-two miles an hour. *The Snap*, 24 Fed. Rep. 292.

If there is no clear evidence that the weather indications were such as should deter a tug from holding her course instead of seeking harbor, and it appears

4. As Common Carrier and Insurer.—In the discharge of the duty of towing vessels, tugs are not to be regarded as common carriers or insurers, or held to accountability as such.¹

that the tug was in charge of a competent and skilled pilot, the tug is entitled to the benefit of any doubt arising from the testimony. *The Frederick E. Ives*, 25 Fed. Rep. 447. See also *The Argus*, 31 Fed. Rep. 481; *The Wilhelm*, 47 Fed. Rep. 89.

If, after a tug had taken a bark in tow, a squall was seen coming, the tug was negligent in not coming to anchor instead of attempting to make the Erie Basin. *The Young America*, 25 Fed. Rep. 207.

When the opportunity offers, neglect to take shelter renders a tug liable for the swamping of a barge in a storm. *The Frank G. Fowler*, 8 Fed. Rep. 340.

A tug is guilty of negligence in taking a tow to sea when a storm is raging. *The Blanche Page*, 4 Ben. (U. S.) 186.

If a tug unreasonably delays a tow, and a sudden and unexpected squall comes up, which the tow would have escaped but for the delay, and the tow is lost, the tug is liable. *The W. E. Cheney*, 6 Ben. (U. S.) 178.

Where a storm is of uncertain duration, a tug, after rounding to to readjust her deckload, may, without negligence, proceed on her voyage. *The Wilhelm*, 52 Fed. Rep. 602.

The owners of a tug are liable for the negligence of the master in taking a tow across New York Bay in a gale of wind, whereby the tow was generally broken up. He ought to have ascertained the state of the weather before leaving shelter. *The Bordentown*, 40 Fed. Rep. 682.

Where it is the usual practice for tugs to wait at a bar for the rising tide, a tug while so waiting is not liable for a tow lost by swamping, when it appears that the tug drew less water than other tugs usually employed in taking barges across the bar. *The Roberts Burnett*, 56 Fed. Rep. 266.

Ice.—A tug towing a vessel through the Narrows is not liable for the loss of a barge which was driven on the rocks off Staten Island by the unexpected meeting of an ice floe and lost. *The Young America*, 31 Fed. Rep. 749. See also as to loss of tow by ice, *The William McCandless*, 10 Ben. (U. S.) 453; *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77; *The Alfred & Edwin*, 7

Ben. (U. S.) 137; *The U. S. Grant*, 7 Ben. (U. S.) 337.

If the river or canal, on which towage service is to be performed, suddenly freezes, it is such an act of God as will excuse performance of the contract. *Worth v. Edmonds*, 52 Barb. (N. Y.) 40.

1. *The Fannie Tuthill*, 12 Fed. Rep. 446; *The Webb*, 14 Wall. (U. S.) 406; *The Margaret*, 94 U. S. 494; *The Annie Williams*, 20 Fed. Rep. 866; *The D. Newcomb*, 16 Fed. Rep. 274 (bailee for hire); *The James Jackson*, 9 Fed. Rep. 614; *The M. J. Cummings*, 18 Fed. Rep. 178; *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77; *Brawley v. The Jim Watson*, 2 Bond (U. S.) 356; *Powell v. The Willie*, 2 Fed. Rep. 95; *aff'd* 8 Fed. Rep. 768; *The Lyon*, 1 Brown Adm. 59; *The Stranger*, 1 Brown Adm. 281; *The Oconto*, 5 Biss. (U. S.) 460; *The R. L. Stevens*, 11 L. R. N. S. 41; *The Princeton*, 3 Blatchf. (U. S.) 54; *The Mary R. McKillop*, 23 Fed. Rep. 829; *The Snap*, 24 Fed. Rep. 292; *The B. B. Saunders*, 25 Fed. Rep. 727; *The Bordentown*, 16 Fed. Rep. 270; *Molenbrock v. St. Louis, etc.*, Packet Co., 16 Fed. Rep. 878; *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505; *The Young America*, 26 Fed. Rep. 174; *The Wm. N. Beach*, 29 Fed. Rep. 303; *The Brazos*, 14 Blatchf. (U. S.) 446; *The Neaffie*, 1 Abb. (U. S.) 465; *The Angelina Corning*, 1 Ben. (U. S.) 109; *Wells v. Steam Nav. Co.*, 2 N. Y. 204; *Caton v. Rumney*, 13 Wend. (N. Y.) 387; *Alexander v. Greene*, 3 Hill (N. Y.) 9; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Leonard v. Hendrickson*, 18 Pa. St. 40; *Brown v. Clegg*, 63 Pa. St. 51; 3 Am. Rep. 522; *Leech v. The Miner*, 1 Phila. (Pa.) 144; *Parmalee v. Wilkes*, 22 Barb. (N. Y.) 539; *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559; *Transportation Line v. Hope*, 95 U. S. 297; *Delaware, etc., Towboat Co. v. Starrs*, 69 Pa. St. 36. *Contra*, it seems a steam tug is a common carrier. *White v. The Mary Ann*, 6 Cal. 462; 65 Am. Dec. 523. See also *Clapp v. Stanton*, 18 La. Ann. 683; *Vanderslice v. The Superior*, 3 L. R. N. S. 399.

In the case of *The Niagara*, 20 Fed. Rep. 152, *Brown, J.*, said: "Owners of tugs are not insurers of the tows in

5. For Negligence.—A tug is not responsible for injuries to the tow unless the injury is the immediate result of a violation or neglect of some duty incumbent on the tug.¹ The obligation of

their charge. They are, indeed, answerable for negligence only, but the negligence consists in the want of ordinary skill in navigation and of the exercise of such care and diligence in handling a tow as a man of ordinary prudence would exercise in the preservation of his own property. Where the trip undertaken will occupy a considerable time, they are bound to take all such safeguards as are necessary to preserve the tow from loss or injury other than any of the contingencies which may ordinarily be expected to arise upon the trip." See also *The Ellen McGovern*, 27 Fed. Rep. 868; *The Allie and Evie*, 24 Fed. Rep. 745.

Towboats are not held to the strict rule applicable to common carriers. Their duties are not confined to the less onerous obligations which a master owes to his employés. They occupy a middle ground between the two. They are bailees for hire, having life and property in their keeping, and are required to exercise ordinary care, skill, and prudence in arranging and navigating the tow. *Bust v. The Cornell Steam-Boat Co.*, 24 Fed. Rep. 188.

In dealing with the question of negligence, the tug cannot be treated as a common carrier. *The Henry Buck*, 38 Fed. Rep. 611.

1. *The Stranger*, 1 Brown Adm. 281; *The Anglo-Australian Steam Nav. Co. v. Cornell Steam-Boat Co.*, 32 Fed. Rep. 798; *The Quickstep*, 9 Wall. (U. S.) 670.

If a tug under complete control of the tug as to motive power is lost, a presumption of negligence arises against the tug. *The Delaware*, 20 Fed. Rep. 797. See also, as to presumption of negligence, *Wilson v. Sibley*, 36 Fed. Rep. 379; *The Quickstep*, 9 Wall. (U. S.) 665; *The M. J. Cummings*, 18 Fed. Rep. 181; *The Delaware*, 12 Fed. Rep. 571; *The Seven Sons*, 29 Fed. Rep. 543.

If the weather is fair, a presumption that a tug is negligent arises if she allows her tow to come in contact with a pier. *Western Assur. Co. v. The Sarah J. Weed*, 40 Fed. Rep. 844.

If a tow is lost by striking a ledge, negligence may be established against the tug, by a clear preponderance of

testimony. *The Narragansett*, 20 Fed. Rep. 394.

In the performance of a towage contract, a tug is bound to exercise ordinary care, skill and diligence. *Mollenbrock v. St. Louis, etc., Packet Co.*, 16 Fed. Rep. 878.

It is negligence for the master of a tug to unnecessarily expose a barge in his tow while making a landing at an intermediate stopping place. *White v. The Laverne*, 2 Fed. Rep. 788.

If a tow grounds in such a position as to make it probable that she will safely float at high water, and the tug, in attempting to pull her off, changes her position so that she strains and breaks, the tug is negligent and liable for the damages. *The Effie J. Simmons*, 6 Fed. Rep. 639.

For a tug, in hitching onto a barge, to collide with it, and then to handle it in a reckless manner and to unnecessarily expose it to danger, is negligence, and will render the tug liable for the resulting damages. *Wagner v. The W. M. Wood*, 45 Fed. Rep. 774.

If a tug negligently strands a tow, she must pay for the injury sustained by the boat while so stranded, unless she can make it clear that such injuries would not have been sustained if the tow had been seaworthy. *The Vigilant*, 10 Fed. Rep. 765. See also *The Jonty Jenks*, 54 Fed. Rep. 1021.

It is negligence for a tug to leave a tow fast to a pier, when the master of the tug knows that there is not sufficient water at the pier at low tide to float the tow, and it appears that the master of the tow gave notice of the danger. *Morse v. The Chas. Runyon*, 56 Fed. Rep. 312.

If an oil barge leaks, and spreads oil over the waters in the vicinity of the tug and tow, it is negligence for a fireman on the tug to throw a shovel of ashes on the water, and the tug is liable for damages caused by the igniting of the oil. *The James Jackson*, 9 Fed. Rep. 614.

For a tug, after replacing a hawser that had parted, to start with a sudden jerk, thereby tearing out a corner post of the tow and causing her to sink, is negligence. *The E. Luckenback*, 15 Fed. Rep. 924; *aff'd* 23 Fed. Rep. 725.

the tug not to injure her tow does not arise from contract, but is imposed by law.¹

VI. RESPONSIBILITY OF TOW—1. In General.—Masters of vessels in tow are bound to obey all the proper orders of the master of the tug, and if the master of the tow refuses such obedience, or is

See also *Wilson v. Sibley*, 36 Fed. Rep. 379.

In *The R. C. Veit*, 56 Fed. Rep. 122, a tug was held not liable for the loss of a scow which went adrift by the pulling out of her stern bitts, some jerking in a heavy sea being unavoidable.

Failure to carry a sufficient supply of coal to enable a tug to lie over with steam up for ten or twelve hours, is negligence, and renders the tug liable for the loss of a barge by abandonment. *The Frank G. Fowler*, 8 Fed. Rep. 340.

It is negligence for a tug to so slacken her speed as to cause a ship in tow to lose her steerage way, by reason of which she grounded. *The Farnsworth*, 6 Fed. Rep. 307.

Owners of tugs are chargeable with negligence in undertaking a towage of a vessel upon trips for which their unfitness is obvious. *Mason v. The William Murtaugh*, 3 Fed. Rep. 404; *Williams v. The William Cox*, 3 Fed. Rep. 645; *aff'd* 9 Fed. Rep. 672.

Steam tugs having boats in tow are bound to exercise all reasonable care and skill in everything relating to the work until it is accomplished, and are chargeable for the want of either to the extent of the damage sustained, and this liability continues, although it may appear that the negligence or unskillfulness of those managing the tow contributed to the collision. *The Annie Williams*, 20 Fed. Rep. 866.

In taking a schooner through a draw she got away from the tug before she drifted more than twice her length. The tug caught her, made fast, and prevented her from grounding on the southern shore. She then pulled the schooner around and pointed her toward the northern shore, but by negligence or mismanagement pushed her too far and grounded her. It was held that the tug was liable. *Grand Trunk R. Co. v. Griffin*, 21 Fed. Rep. 733.

Proof of the custom of towing barges with uncovered hatches to save the expense of trimming their cargoes of coal, will not exonerate a tug from liability for one lost while being taken across New York Bay in a gale of

wind. *Mason v. The William Murtaugh*, 3 Fed. Rep. 404.

As to uncovered hatches establishing contributory negligence, see *The Oswego*, 8 Ben. (U. S.) 129.

The stranding of a vessel upon a well-known shoal, by two tugs which were, by the usage of the port, in command of the captain of the tug first engaged, is negligence, and renders both tugs liable. *The Arturo*, 6 Fed. Rep. 308. Where a landing place has been chosen by the tow which looked as if it were suitable for the purpose chosen, a tug is not guilty of negligence in running on a hidden obstruction. *Powell v. The Willie*, 2 Fed. Rep. 95.

A tug which attempts to heave a line to a schooner and is prevented by the interference of another tug until the schooner grounds, is not guilty of such negligence as will render her liable to the schooner. *The E. D. Holton*, 55 Fed. Rep. 1010.

If a tow is struck by a raft set adrift by a sudden freshet, and there is no negligence on the part of the tug, the tug is not liable. *McGovern v. Lewis*, 56 Pa. St. 231; 94 Am. Dec. 60.

1. In *The Brooklyn*, 2 Ben. (U. S.) 547, Blatchford, J., said: "In the present case the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage any more than the obligation of a third vessel meeting a canal boat on her trip, not to collide with her, arose out of such contract or out of any contract. The obligation of the steamboat not to commit such tort arose out of the principle applicable in all cases of tort—*sic utere tuo ut non alienum lædas*. Her duty did not result from the consideration paid or to be paid for the towage. It was imposed by the law and would have existed even though her service had been gratuitous. If the libellant's property was lawfully where it was, the steamboat owed a duty toward it independent of any contract of towage, and is liable for collision and the consequent damage to such property caused by negligent navigation amounting to a breach of such duty.

guilty of negligence, or carelessness, or want of due skill and care in the performance of his duties, the owners of the tug are not liable for the consequences to the owners of the tow.¹ It is incumbent upon the tow to be steered properly, to follow in the wake of the tug, and to perform all those duties which nautical skill demands in order to properly manage the tow.²

2. Contributory Negligence of Tow.—If those in charge of a tow are guilty of contributory negligence, there can be no recovery against the tug for injuries received.³

The duty was of the same character as that imposed by the law upon a third and stranger vessel."

1. *Dutton v. The Express*, 3 Cliff. (U. S.) 462; *The Annie Williams*, 20 Fed. Rep. 866; *The Brooklyn*, 2 Ben. (U. S.) 547.

2. *Stretch v. The Margaret*, 2 Fed. Rep. 255.

Where the master of the tug gives the master of the tow express directions to follow in the wake of the tug, if the tow, after observing a change of course in the tug, fails to follow, but steers off and strands, the tug is not liable. *The Jacob Brandow*, 39 Fed. Rep. 831.

A vessel being towed must keep close watch and obey all signals. *The Maria Martain*, 2 Biss. (U. S.) 41.

If a tow, while under the control of the tug, follows in her wake as closely as possible, she is not liable for any injury that may happen to her by running against an obstruction. *The T. J. Schuyler v. The Isaac H. Tilyer*, 41 Fed. Rep. 477.

3. *Ferris v. The Alida*, 13 Rep. 677; *The Margaret*, 2 Flip. (U. S.) 640.

If a man in charge of a barge throws off a line without authority, and damage results, the barge is, to that extent, in fault. *The Pres. Briarly*, 24 Fed. Rep. 478. See also *Dutton v. The Express*, 3 Cliff. (U. S.) 462.

If a tug leaves a barge at a stake-boat over night, and the barge rolls heavily and loses her deckload, the loss being due to her being improperly loaded and rendered top-heavy, though the leaving of the barge was the remote cause, yet her top-heavy condition is the proximate cause, and exonerates the tug from liability. *The King Kalakau*, 43 Fed. Rep. 172.

Placing coal in the stable of a canal boat, and then trying to balance the weight by putting coal on the after-deck, is such contributory negligence on the part of the master of the tow as will compel a division of dam-

ages in case the barge is sunk by the deckload washing overboard and the weight in her stable causing her to ship water and swamp. *Connolly v. Ross*, 11 Fed. Rep. 342.

If the owners and captain of a barge, knowing there are no means on the barge of signaling the tug, allow her to be taken in tow, and she is lost, they are guilty of contributory negligence. *The M. J. Cummings*, 18 Fed. Rep. 178.

It is incumbent on the owner of an old boat to give notice of her condition to the master of the tug. In case he does not, the tug is liable only for want of ordinary care in handling her. *The Syracuse*, 18 Fed. Rep. 828.

If the captain of a rotten old canal boat refuses to be towed to a place of safety after being jammed against a wharf, but demands to be towed to his destination, and the barge sinks *en route*, no recovery can be had against the tug. *The George W. Mead*, 8 Ben. (U. S.) 481.

Leaving the tiller of a canal boat is gross negligence on the part of the helmsman. *The Jonty Jenks*, 54 Fed. Rep. 1021.

If the captain of the tow knows that the tug master is violating the orders of his owners in towing to the place agreed on, no recovery can be had for the loss of the tow. *The R. F. Cahill*, 9 Ben. (U. S.) 352.

Carrying too much sail at a critical point is contributory negligence on the part of the tow. *The Margaret*, 2 Flip. (U. S.) 640.

If a tug leaves its tow in a safe place, it is negligence on the part of the master of the tow to remove it to an unsafe place. *The P. C. Schultz*, 10 Ben. (U. S.) 536.

When Tow Not Guilty of Contributory Negligence.—It is not contributory negligence for a schooner, which has signaled for a tug, to use a towline one hundred feet long when it appears that the line had been used before in towing

VII. MUTUAL RESPONSIBILITY OF TUG AND TOW.—When special dangers arise which were not contemplated by the original towage contract, and the captains of the tug and tow agree to assume them, the consent of the tow-owners not having been obtained, they are mutually at fault, and each barge is chargeable with one-half the loss.¹

VIII. REMUNERATION FOR TOWAGE—1. In General.—The owners of a tug will be entitled to recover the sum agreed to be paid them for the services rendered to the tow. If no sum has been agreed upon, they can claim such a sum as will constitute fair and reasonable remuneration for the services rendered.² But an agreement made under circumstances of distress, to pay an exorbitant amount, will not be enforced.³ Where a fixed sum for towage has been agreed on, the owners of the tug will be bound thereby, and cannot claim extra remuneration in conse-

with the same tug; where the weather is not heavy enough to make navigation difficult or perilous, although she has another new line used only in stormy weather; especially when the tug whose services have been accepted had been obstructed in making fast to the schooner by the endeavors of a rival tug to take the tow. *The E. D. Holton*, 55 Fed. Rep. 100.

Contributory negligence cannot be imputed to the captain of a tow for not protesting against the exposure of his boat, unless the danger is very obvious. *White v. The Lavergne*, 2 Fed. Rep. 788; *distinguishing Mason v. The William Murtaugh*, 3 Fed. Rep. 404.

If the captain of a tug fails to have lights on his boat, the master of the tow cannot be charged with negligence. *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559.

Failure of Charterer to Furnish Provisions.—If the charterer of a tug bound himself to furnish provisions and failed to do so, he cannot recover against the tug for failure to perform the services agreed upon when such failure was caused by a lack of provisions. *Ferris v. The Alida*, 13 Rep. 677.

As to control of charterer over pilot of the tug charter, see the *Martin Kalbfleisch*, 55 Fed. Rep. 336.

1. *The E. A. Packer*, 22 Fed. Rep. 668.

It is negligence in both the owner of the tow and tug to proceed on a voyage, where the tow is known to be unfit to encounter the hazards of the trip. *Mason v. The William Murtaugh*, 3 Fed. Rep. 404; *Williams v. The William Cox*, 3 Fed. Rep. 645; *Connolly v. Ross*, 11 Fed. Rep. 342.

While it is negligence for the master of a tug to put an old boat, weak and more deeply laden than others, in the front tier of the tow, if the owner of the barge does not object to proceeding with his boat so placed, he will be deemed to have acquiesced, and if she is lost, it is a case of concurrent negligence in both parties. *The Borden-town*, 16 Fed. Rep. 270.

2. Where the master of a vessel does not stipulate with the tug, when the towage is payable, the custom of the port respecting contracts for round towage will govern and the towage is payable at the port just before the vessel is towed back to sea. *The Queen of the East*, 12 Fed. Rep. 165.

For towing a vessel into New York harbor from a point about 125 miles from Sandy Hook, the weather being fair and the vessel towing sustaining no damages, \$3,750 is a fair compensation. *The Leipsic*, 5 Fed. Rep. 108.

The master's certificate as to the amount agreed upon to be paid for towage, is generally conclusive. *The Senator*, 1 Brown Adm. 544.

Where a barge laden with wood was driven ashore, and the owner of the wood offered to unload it at his expense, but the master refused to permit it, a tug sent to pull the barge off must look to the barge and not the load of wood for its compensation. *The Eugene Vesta*, 28 Fed. Rep. 762.

3. See *The Sophia Hauson*, 16 Fed. Rep. 144; *The Jacob E. Ridgeway*, 8 Ben. (U. S.) 179; *The Homely*, 8 Ben. (U. S.) 495; *The Remnants of Jeremiah*, 10 Ben. (U. S.) 338, when agreements were set aside as extortionate, and a fair amount allowed.

quence of delay occurring without fault of either the tug or tow.¹ In case a tug is carried away from her ordinary employment to a foreign port, and detained there for a time, remuneration will be awarded her at an extraordinary rate, and not mere ordinary towage.² The burden of showing an agreement as to remuneration for towage services lies, in all cases, upon the party setting it up.³

2. **Lien for.**—The sum payable for towage creates a maritime lien on the vessel towed, which lien will travel with the *res*, and rank for payment equally with a lien for salvage or pilotage.⁴ The towage service must be actually rendered in order to create the lien; an unexecuted contract to tow is not enough.⁵ The lien, however, when acquired, must be enforced without delay, or it will be considered waived as against a purchaser without notice.⁶

IX. ACTIONS FOR TOWAGE OR DAMAGES—1. **Jurisdiction.**—The courts of admiralty have jurisdiction to hear and determine all claims or demands arising from towage contracts, whether the service is rendered on the high seas, or on navigable rivers lying within the body of the country.⁷ Tort is usually the proper

1. *The Betsey*, 2 W. Rob. 167.

2. *The Bativier*, 1 Spinks 174.

3. *The Minnehaha*, 15 Moo. P. C. C. 133; Lush. 335.

4. *The W. J. Walsh*, 5 Ben. (U. S.) 72; *The Mystic*, 30 Fed. Rep. 73; *The James McMahon*, 10 Ben. (U. S.) 103; *The Alabama*, 22 Fed. Rep. 449.

In the absence of proof of a general custom to the contrary, a maritime lien will attach to a ship for towage services. *Learmouth v. The Yuba* (V. A. C. 1888), 14 Q. L. R. 132.

Under the general maritime law, no lien attaches to a vessel for towage services rendered in its own port. *The Daniel Kaine*, 31 Fed. Rep. 746.

When the amount of a towage bill is not disputed, but the respondent sets up certain claims against the tug for damages to barges other than the one for which towage is claimed, and offers to pay the amount due less the claims, coupled with a demand for a receipt in full, it is not a sufficient tender to destroy the lien of the tug on the barge for the towage. *L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926.

Where there is a towage contract from sea to sea, the contract must be treated as a whole and cannot be said to be unexecuted where there is a part performance. A lien will, therefore, attach to the ship for the full amount due the tug. *The Queen of the East*, 12 Fed. Rep. 165.

If towage service was rendered on the credit of an ice company, and the

master of the schooner told the tug captain that the ice company would pay, and the ice company did in fact pay a portion of the towage bills, the tug cannot have a lien on the schooner for towage services which were not paid for by the ice company on account of its failure. *The Sarah Cullen*, 45 Fed. Rep. 511.

5. *The Prince Leopold*, 9 Fed. Rep. 333.

6. *The Frank*, 25 Fed. Rep. 287.

7. In *The W. J. Walsh*, 5 Ben. (U. S.) 72, Benedict, J., said: "There is no room to contend that the towage contracts, set up in the libel, are not maritime contracts. A maritime contract in law, as now understood, is any contract which necessarily is appurtenant to navigation, such as the transportation of passengers or freight on navigable waters, or the navigation of vessels on such waters, or supplying the necessities of vessels used on such waters. A contract to furnish the motive power to a vessel so used is of the same class. It appertains to navigation in the strictest sense, and is as distinctly maritime in character as a contract to steer the boat or to carry cargo in her. The steamboats which tow the boats and barges, by means of which commerce between *New Jersey* and *New York* is transacted, are as much engaged in navigation as are the boats in which the cargoes are placed, and it is not only navigation but commerce among the states. Indeed, the contract

in question contains almost all the features formerly considered necessary in a maritime contract under a much narrower view of jurisdiction than at present prevails. I am, therefore, at a loss for any ground upon which it can be held that here is not a maritime contract."

Towage Services Are Maritime in Their Character. — *The Acadia*, 1 Brown Adm. 73.

In *The Brooklyn*, 2 Ben. (U. S.) 547, Blatchford, J., said: "It is contended that, in view of the decision of the supreme court, in *Allen v. Newberry*, 21 How. (U. S.) 244, to the effect that a district court has no jurisdiction over a contract of affreightment of goods between two ports in the same state, and of the decision of the same court, in *Maguire v. Card*, 21 How. (U. S.) 248, to the effect that a district court has no jurisdiction over a contract for supplies furnished to a vessel engaged in the business of navigation and trade between ports exclusively within the same state, this court has no jurisdiction to award damages in this suit for the loss sustained by the libellants. It is true that this court did, in the case of *Poag v. The McDonald* (April, 1859), dismiss the libel for want of jurisdiction, on a state of facts precisely like that in the present case, the decision being founded on a supposed effect of the decisions in *Allen v. Newberry*, 21 How. (U. S.) 244, and *Maguire v. Card*, 21 How. (U. S.) 248. It is also true that Mr. Justice Nelson, in the circuit court, on an appeal taken in *Poag v. The McDonald* (in Aug. 1860), sustained the dismissal of the libel for want of jurisdiction, on the view that, even though the suits were to be regarded as founded in tort, for negligence and carelessness, the district court had no jurisdiction of it because both of the vessels were, at the time of the commission of the tort engaged solely in the internal commerce of the states. But this view has, since that time, been departed from, in practice both by this court and by the circuit court. In *Langley v. The Syracuse* (March, 1867), which was a suit brought in this court, by the owner of a canal boat towed from Albany to New York, against the steamboat which towed her, to recover damages occasioned through the wrongful and tortious act of the steamboat, by the sinking of the canal boat while in tow of her, the same judge (Judge Betts)

made a decree in favor of the libellant who had dismissed the libel in *Poag v. The McDonald*, and that decree was affirmed by Mr. Justice Nelson, in the circuit court as recently as in November, 1867. *The Syracuse*, 6 Blatchf. (U. S.) 2. Such I understand to be the settled law and practice of this court, and of the circuit court, in cases of like character; and I know that Mr. Justice Nelson does not adhere to the views expressed by him in his opinion delivered in the case of *Poag v. The McDonald* so far as they apply to the question of jurisdiction involved in that case." See also *The Commerce*, 1 Black (U. S.) 574.

In *England*, by the statute 3 & 4 Vict., ch. 65, § 6, the admiralty division of the high court has jurisdiction to hear and decide upon all claims or demands in the nature of towage, whether the services were rendered on the high seas or in the body of a county. Thus the admiralty division can hear an action instituted by the owners of a tow against her tug for negligently towing her so as to cause her to come into collision with another vessel or to damage herself. *The Energy*, L. R., 3 A. & E. 48; *The Nightwatch*, Lush. 542, 8 Jur. N. S. 1161. The jurisdiction of the admiralty court existed in respect of claims for towage services rendered, not in respect of claims against the owner of the towing vessel for breaches of contract. It follows that an action by the vessel towed against her tug for negligence in making the vessel take the ground, could not, previously to the adjudication acts, be brought in the admiralty court. *The Robert Pow*, 2 B. & L. 99; 9 L. T. N. S. 237.

A county court having admiralty jurisdiction will have jurisdiction to hear and determine any claim for towage, the amount of which does not exceed £150, or any claim whatever to an amount, when the parties agreed by memorandum signed by them, their solicitors, or agents, that the county court shall have jurisdiction to hear it. *The Hjemmaett*, 5 Prob. Div. 227; 42 L. T. 514.

Under 26 Vict., ch. 24, § 10, the various vice-admiralty courts abroad have jurisdiction to hear and determine any claims in respect to towage. The admiralty court has, however, concurrent jurisdiction with the vice-admiralty courts. *The Peerless*, Lush. 103.

form of action,¹ and the burden of proof is ordinarily on the libellant.²

2. Parties.—If the claim is for damages for an injury sustained by a tow through the negligence of another vessel, the suit ought to be against all the parties concerned, in order that the rights of the parties may be determined in a single suit, and the loss imposed where it belongs.³ Where a suit is for earnings from towage, the mortgagee in possession has a right to file a libel *in rem*.⁴ The owner of a tug being a bailee of its tow, may maintain an action for injury to it by collision, without regard to any right of subrogation to the claim of the owner by payment to the latter of the damages sustained, or to the fact whether or not he has made such payment.⁵

3. Lien for Damages.—The lien for damages claimed against a tug for injuries to the tow must be taken subject to all the liens to which the tug was subject at the time of the injury.⁶

4. Evidence.—In actions based on negligence, if the evidence disclose no injury traceable to the negligence complained of, the libel will be dismissed.⁷

1. In *Ashmore v. Pennsylvania Steam Towage, etc., Co.*, 28 N. J. L. 180, it was held that the proper form of action against the owners of a tow boat for the negligence of their agent was tort, although there might be an express contract touching the towage.

2. In actions for negligent towage, the burden of proof is ordinarily on the libellant. *The Princeton*, 3 Blatchf. (U. S.) 54. But when the case discloses that the towage service miscarried because an immediate peril was encountered, which both parties deemed imminent, the presumption of negligence on the part of the tug is materially weakened. Under such circumstances, it is not unreasonable to require the party who imputes the fault to the other to locate the fault with precision. *The Packer*, 28 Fed. Rep. 156.

Defense.—It is no defense in an action for injury to a tow to say that the master of the tow gave the pilot of the tug certain directions which he followed at the time of the accident. *Hill v. Rogers*, 1 Pittsb. (Pa.) 163.

3. *The Marshall*, 12 Fed. Rep. 921.

4. *Kearney v. A Pile-Driver and Stage*, 3 Fed. Rep. 246.

A suit *in rem* cannot be maintained against a steamboat for damages to the tow when it appears that the tow was injured by other tugs employed to turn it around, and that the damage was done before the steamboat took charge. *The Syracuse*, 36 Fed. Rep. 830.

5. *The Jersey City*, 2 C. C. A. 365.

An insurer may maintain an action for damages against the offending vessel in his own name after payment of the loss. He is the party really entitled to damage and the party in whose name actions should be more properly brought. *The Monticello v. Mollison*, 17 How. (U. S.) 152; *Fretz v. Bull*, 12 How. (U. S.) 468; *The Frank G. Fowler*, 8 Fed. Rep. 360.

If a barge is injured by the negligence of a tug, the bailees of the barge may have an action *in rem* against the tug to recover damages for the injury. *The Venture*, 18 Fed. Rep. 462. 'The owners of a tug which leaves a tow in an exposed position, are liable *in personam* to the owners of a barge sunk by a storm coming up during the absence of the tug. *Connolly v. Ross*, 11 Fed. Rep. 342.

Burden of Proof.—The burden of proof is upon the barge owner to show that the negligence of the tug was the proximate cause of the injury to the tow. *The Mary*, 14 Fed. Rep. 584.

6. *The Grapeshot*, 22 Fed. Rep. 124. See also *The Frank G. Fowler*, 17 Fed. Rep. 653; *The Samuel J. Christian*, 16 Fed. Rep. 796.

7. *The Aurora v. The Republic*, 25 Fed. Rep. 778; *The Nellie Flag*, 23 Fed. Rep. 671; *The Charles Allen*, 23 Fed. Rep. 407.

In actions to recover damages for the alleged negligence of a tug, the burden

X. MEASURE OF DAMAGES—1. For Injuries.—The measure of damages is the loss sustained over and above what would have been sustained if reasonable care and skill had been exercised.¹ If the owners of the tug put the tow in as good condition as she was before the accident, damages can only be recovered for the delay.²

2. For Violation of Towage Contract.—The measure of damages for the violation of the towage contract is the contract price less the expense necessary to complete the contract. But where the master of the vessel to be towed refuses to state what he paid to other tow boats for the same labor, the court will award the contract price as damages.³

XI. DIVISION OF DAMAGES.—Where both parties are at fault, the damages will be divided.⁴ So where the injury is attributable to negligence in the management of the tug and enhanced by the

of proof is on the libellants to show such negligence. And where there is no proof of negligence on the part of the tug, the libel will be dismissed. *Ritcher v. The Olive Baker*, 40 Fed. Rep. 904.

Where a towage contract stipulated that a barge should be landed at a particular place, and the tug landed her at a different place, and she was sunk and lost, evidence that she was not injured by sinking at the latter landing, that by ordinary care of plaintiff she could have been saved, that plaintiff was offered one-half her value as she lay, that sunken she was worth one-half of her value, that she was allowed to lie until her cargo was stolen, and that she was sold for wharfage, is irrelevant. *Barnhill v. Haigh*, 53 Pa. St. 165.

1. *McCormick v. Jarratt*, 37 Fed. Rep. 380; *Pettie v. Boston Tow-Boat Co.*, 44 Fed. Rep. 382.

The indemnity payable to the owner of a tow injured by the negligence of a tug is the value of the tow at the time and place she was injured, payable in the currency of the place where she was injured. *Cramer v. Allen*, 5 Blatchf. (U. S.) 248.

Where there is no agreement to the contrary, the owners of the tow boat are liable for all damages occasioned by the negligence of their agent. *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180.

If a vessel, towed in so negligent a manner as to be grounded, employs another tug to help get her off, she can recover the amount paid as salvage from the tug that grounded her. *The C. F. Ackerman*, 8 Ben. (U. S.) 496.

2. *The James H. Brewster*, 34 Fed. Rep. 77.

If a canal boat is sunk slowly by the fault of the tug, and is afterwards repaired at the tug's expense, the owners of the tow can only hold the tug responsible for the value of personal property on board at the time of the accident, and loss and demurrage for the barge from the time of the accident till the time she was let off the ways. *O'Hare v. The Brilliant*, 3 Fed. Rep. 719.

3. *The Vincenz Pinotti*, 16 Fed. Rep. 926.

A tow boat is liable *in rem* for a breach of towage contract. *The James McMahon*, 10 Ben. (U. S.) 103.

Damages for Detention.—Damages for detention are not recoverable where there was an agreement between the tug and vessel that the vessel should anchor to sheathe, and the evidence shows no unreasonable delay in sheathing. *The Sebastian Bach*, 12 Fed. Rep. 172.

4. *The Young America*, 20 Fed. Rep. 926; *The W. A. Levering*, 36 Fed. Rep. 511; *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505.

Where an attempt was made to run past certain bridge piers on a bad night, and the tow went on the piers, but the impact was so slight that had she been a sound boat no damage would have resulted, and sank, negligence will be imputed to both tug and tow, and the damages will be divided. *The William Kraft*, 33 Fed. Rep. 847.

Where a boat in tow is separated by the fault of the tug, but it appears that she could have been saved if she had been provided with an anchor, the dam-

weak condition of the tow, of which the owner had neglected to inform the master of the tug, only one-half damages will be allowed.¹ But a previous condition of weakness on the part of the vessel negligently sunk will not constitute such a fault in the vessel sunk as will permit a division of damages, where it is shown that such a condition did not contribute to the accident or induce the fault, and it not being possible that any express notice of such condition could have affected the navigation.²

TOWARDS.³—(See also TO.)

TO-WIT—(See *SCILICET*, vol. 21, p. 851).—That is to say, namely, the same as *videlicet* or *scilicet*.⁴

ages will be divided. *Cramer v. Allen*, 5 Blatchf. (U. S.) 248.

In *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30, *aff'g* 5 Ben. (U. S.) 244; 6 Ben. (U. S.) 272, while a tow was found to be solely in fault for her unseaworthy condition, which caused her to be cast off to sink, yet the tug was found to have cast her off in a negligent manner, and the damages were apportioned. *The Bordentown*, 16 Fed. Rep. 270.

In *Connolly v. Ross*, 11 Fed. Rep. 342, where a tug was condemned for leaving canal boats unattended and helpless, moored in a harbor unsafe in one quarter, and the boats were held negligent for overloading and improper loading, the damages were divided.

1. *The Bordentown*, 16 Fed. Rep. 270.

The owner of a boat is bound to give notice of any infirmity about his boat, if she be not staunch and strong. And where this is not done, he must be held jointly or solely responsible for injuries received according to the circumstances of the case. *The Syracuse*, 12 Fed. Rep. 828. See also *The M. J. Cummings*, 18 Fed. Rep. 178.

2. In *Pettie v. Boston Tow-Boat Co.*, 44 Fed. Rep. 382, Brown, J., said: "Upon all the testimony in this case, I cannot resist the conclusion that the inability to raise the libellant's barge was because she was weak and rotten about her deck and water-ways, so that she could not sink with a hole in her bottom and lie in a moderate tide even in mild weather without partially breaking up, and thus become incapable of being raised. This previous condition, however, in no way contributed to the accident or induced the fault of the tug, nor could any notice of this condition be supposed possibly to have affected the navigation of the tug. I cannot find, therefore, that the barge was partially in fault so as to direct

any division of the damages." See also *The Granite State*, 3 Wall. (U. S.) 310.

3. The word "toward," in a statute making insulting language toward a female relative of the prisoner a mitigation of homicide from murder to manslaughter, was held not to mean simply "to," but to include insulting words about a female relative, whether she was present or absent. *Hudson v. State*, 6 Tex. App. 565.

4. The office and effect of the phrase "to-wit," or *videlicet*, as it is called, is to particularize what is too general in a preceding sentence, and render clear and of certain application that which might otherwise seem doubtful or obscure. *Buck v. Lewis*, 9 Minn. 314.

An imperfect particular description after the phrase, "to-wit," or *videlicet*, will not control a sufficient general description. It was so held in a case where a will was in controversy. *Agnell v. Abnett*, 4 Mod. 411.

In Pleading.—The phrase "to-wit," or *videlicet*, is used in pleading to avoid any variance between the averments and proof; and its effect is to sustain the positive averments in declarations which require strict proof. See *Brown v. Berry*, 47 Ill. 175; *Waller v. Ellis*, 2 Munf. (Va.) 88; *Paine v. Fox*, 16 Mass. 128.

But, where time is material to the merits, the substance of the issue must be strictly proved, and the insertion of a *videlicet* will not help. *Steph. Pl.* 293, 4; *Min. Inst.*, vol. 4, p. 66; *Brimwood v. Barrett*, 6 T. R. 462.

So, also, where the place is a matter of description, it must in all cases, notwithstanding the use of a *videlicet*, be stated truly and according to the fact. Under peril of a variance, if an issue should be adjoined thereon. *Steph. Pl.* 291, 2.

See *PLEADING*, vol. 18, p. 467.

TOWNS AND TOWNSHIPS.—(See MUNICIPAL CORPORATIONS, vol. 15, p. 949.)

- I. Definitions, 98.
 1. "Town" in England, 98.
 2. "Township" in England, 98.
 3. "Town" in the United States, 99.
 4. "Township" in the United States, 99.
- II. Creation, 101.
- III. Boundaries; Divisions, 106.
 1. In General, 106.
 2. Enlargement; Severance, 108.
 - a. In General, 108.
 - b. Apportionment of Indebtedness, 114.
 - c. Equalization of Taxation, 117.
 3. Districts; Reservations, 119.
 - a. School-Land Sections; Ministry Lots, 119.
 - b. School Districts, 120.
 - c. Road Districts, 122.
 - d. Village Districts, 123.
 - e. Election Districts, 124.
 - f. Fire Limits, 124.
4. Town-Site Laws, 128.
- IV. Government, 132.
 1. Governing Bodies; Ordinances, 132.
 2. Meetings—Votes, 152.
- V. Powers and Privileges, 159.
- VI. Duties and Liabilities, 166.
 1. In General; Acts of Officers, 166.
 2. Upon Contracts; Town Bonds, 172.
 3. Torts, 184.
 - a. In General, 184.
 - b. Coincidental Proximate Causes, 200.
- VII. Officers, 205.
 1. Election or Appointment, 205.
 2. Powers and Duties, 209.
 3. Liabilities, 215.
 - a. To Persons, 215.
 - b. To the Town, 217.
 4. Compensation, 220.
 5. Termination, 223.
- VIII. Discontinuance, 223.

I. DEFINITIONS—1. "Town" in England.—Towns of different countries differ in character, powers, and organization.¹ In *England*, originally, "town" was synonymous with "ville."² The Saxon word "tun" meant a walled place.³

But in modern British legislation, a "town" means the space covered by, or occupied as accessory to, a collection of houses sufficient to be designated in popular parlance, a town, including also lands not built on, that may lie within the ambit thereof, but not lands outside such ambit, though within a borough.⁴

2. "Township" in England.—A township generally denotes a district containing a town and under the same administration.⁵

1. "Town corporations in *America* are as different from those of *England* as the latter are from similar corporations in *Scotland* and *Holland*." Grimke, J., in *Rosebauch v. Saffin*, 10 Ohio 31.

2. "*Villa est ex pluribus mansionibus vicinata, et collecta ex pluribus vicinis*." . . . It cannot be a town in law, unless it hath, or in time past hath had, a church and celebration of divine service, sacraments, and burials." Co. Litt. 115, b. This, however, Blackstone regards as rather an ecclesiastical than a civil distinction. "The word has become a generic term." 1 Bl. Com. 113. In *Elliott v. South Devon R. Co.*, 17 L. J., Exch. 262, the court, by Parke, B., said: "A

town is a place with a constable or a church."

3. Webster Dict. "Upland towns, which are not governed as boroughs, are but towns, though inclosed with walls." Finch 80.

"Tun"—an obsolete form of "town." Cent. Dict.

4. Towns Improvement Cl. Act, 10 & 11 Vict., ch. 34; *Falkner v. Somerset*, etc., R. Co., L. R., 16 Eq. 458. Similarly in a Turnpike Act, 3 & 4 Vict., ch. 61, § 1; *Reg. v. Cottle*, 16 Q. B. 412. And see *Wilb. Stat. Cl.* 122.

5. When a hamlet is adjacent to a town, but governed by separate officers, it is to some purposes in law, looked upon as a distinct township. 1 Bl. Com. 115.

In some statutes the word township is nearly synonymous with parish.¹

3. "Town" in the United States.—In the *New England* states, a town is a political unit, an incorporated subdivision of a county. In some other states, where the county is the unit, the town is a mere subdivision, having in some matters local self-government. Where the subdivisions are called "townships," the word "town" is used somewhat generically, to designate a village, borough, or smaller city.²

4. "Township" in the United States.—In *New England*, a township is one of the units of survey into which a county is divided. In states surveyed under the public-land system of 1796, such

1. *E. g.*, "township, parish, or place," in the beer license law. 3 & 4 Vict., ch. 61, § 1; *Preston v. Buckley*, L. R., 5 Q. B. 391.

2. In *Alabama*, a town or other municipality is strictly a political institution—a part of the internal government of the state. *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611.

In *Arkansas*, a "town" cannot properly be a very small village. *Murray v. Menefee*, 20 Ark. 561.

In *California*, in a statute inhibiting the requirement of bonds in civil actions against certain municipal corporations, the expression "county, city, or town" was held to include the "city and county" of San Francisco. *Morgan v. Menzies*, 60 Cal. 341.

In *Colorado*, in the absence of statutory limitation, a town may embrace only sixteen acres of territory. *Guebelle v. Epley*, 1 Colo. App. 199.

In *Connecticut*, "towns are territorial corporations into which the state is divided by the legislature from time to time, at its discretion, for political purposes and the convenient administration of government." *Gray, J.*, in *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

In *Illinois*, under the township system for the division of a county into "towns," the word means municipal corporations; a "town" generally embracing a township according to government surveys. In *Illinois Rev. Stat.* 1845, p. 111, "town" simply means the collection of residences which in the earlier statute is called "an incorporated town," and in the later, a "village." *Martin v. People*, 87 Ill. 524. In the statutes, "incorporated town" seldom if ever designates a township. *Harris v. Schryock*, 82 Ill. 119. As to the difference between a township and

an incorporated town, see *People v. Harvey*, 142 Ill. 573.

In *Indiana*, as to a civil town distinct from the town incorporated upon the same territory for school purposes, see *Indiana Rev. Stat.* (1888), § 4438; *Huntington v. Day*, 55 Ind. 7; *Noblesville v. McFarland*, 57 Ind. 335; *Inglis v. State*, 61 Ind. 212; *Harris Tp. v. McGregor*, 67 Ind. 380. In a statute prohibiting shooting in a "town or village," "town" is generic, and includes cities. *Flinn v. State*, 24 Ind. 286. Compare *State v. Craig*, 132 Ind. 54.

In *Iowa*, there can be no definite distinction between the two, based on size or employment. Ordinarily, a village is the smaller, and is occupied more by agriculturists. *Truax v. Pool*, 46 Iowa 256. In a stipulation not to resume business in the same "town," the word has been held to include the vicinity. *Steyer v. Dwyer*, 31 Iowa 20.

In *Maine*, acceptance of the act of incorporation is not necessary to the existence of a town. *Gorham v. Springfield*, 21 Me. 58. "Town" is of late often colloquially used in *New England* as a short synonym of municipal corporation. See index of recent volume of *Maine Reports*, under "Towns."

Under the *Massachusetts* constitution, the word "town" may mean a representative district. *Williams v. Whiting*, 11 Mass. 425. In a statute for establishing truant schools, "if three or more towns in a county so require," the word "towns" may include cities. *Lynn v. Essex County*, 153 Mass. 40.

In *Minnesota*, in the special act of 1875, requiring each "town and township" to provide for the poor, in the manner of counties, the words include incorporated cities. *Odegard v. Albert Lea*, 33 Minn. 351.

In *Mississippi*, "municipal corporations are divided into three classes, viz.: cities, towns, and villages. . . . Those having less than 2,000 and not less than 500 inhabitants are towns." *Mississippi Code* 1892, § 2911. In a statute imposing a privilege tax on a private boarding house in a "town," the word does not apply exclusively to incorporated towns. *Murphy v. State*, 66 Miss. 46.

The *Missouri* statutes punishing conversion or embezzlement by officers of "towns," cities, or counties, are held to apply also to officers of townships. *State v. Hays*, 78 Mo. 600; *State v. Cleveland*, 80 Mo. 108.

Under the *New Hampshire* statute, "town" means any incorporated place whose inhabitants are required to pay a tax. *New Hampshire Pub. Stat.* 1891, p. 49, § 5. And all places incorporated by the name of parishes with town privileges, are towns, p. 144, § 2. An act of incorporation raises no conclusive presumption that the place was not previously a corporate town. *Bow v. Allentown*, 34 N. H. 351. A township grant does not constitute a town. *Wells v. Burbank*, 17 N. H. 393. An unincorporated place may be a "town," if its inhabitants are required to pay taxes. *New Boston v. Dunbarton*, 12 N. H. 409; *Russell v. Dyer*, 40 N. H. 173. A "practical location" of a town may supersede the boundaries laid down by the charter. *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491.

Under the *New Jersey* statutes, "towns" may include cities. *State v. Parsons*, 40 N. J. L. 4. But such meaning may be excluded by a very slight indication of purpose by the law-maker. *State v. Richards*, 42 N. J. L. 497.

In *New Mexico*, "every municipal corporation having a population of 3,000 and upwards shall be a city; of 1,500, an incorporated town." *New Mexico Comp. L.* (1884), § 1670.

In those *New York* statutes intended to have effect throughout the whole state, "town" may include city. *Charity Com'rs v. McGurrian*, 6 Daly (N. Y.) 356. In the *New York* lien law of 1854, "town" cannot include Brooklyn. *Rafter v. Sullivan*, 13 Abb. Pr. (N. Y.) 262.

By *New York Laws* (1892), ch. 569, § 2 (Am. G. L., ch. 20), p. 2227, "A town is a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such

duties of local government and administration of public affairs as have been or may be conferred or imposed on it by law." By section 134, as to strays and wrecks, villages and cities are considered towns.

In *North Carolina*, a "town" is a parcel of the state, an emanation therefrom for purposes of convenience. *Weith v. Wilmington*, 67 N. Car. 24.

Under some *Ohio* statutes, "town" may include incorporated villages. *Peck v. Weddell*, 17 Ohio St. 271.

In *Oregon*, oral evidence may determine whether a platted place has houses, etc., sufficient to be a "town" within a statute prohibiting toll-gates within a town. *Milarkey v. Foster*, 6 Oregon 378; 25 Am. Rep. 531.

In *Rhode Island*, "town" is a generic term, and, in the absence of contrary legislative indication, will embrace city. *State v. Glennon*, 3 R. I. 276.

In *Texas*, a "town," within the statute for incorporation for school purposes, is a considerable aggregation of houses in close proximity. *State v. Eidson*, 76 Tex. 302. Within the Homestead Law, a "town" may be an aggregation of houses contiguous and inhabited, though not incorporated. *Williams v. Willis*, 84 Tex. 398. The incorporation may properly include the territory inhabited by the persons attending church and school near the others, though it be not platted. *State v. Baird*, 79 Tex. 63. The attempt of Oak Cliff to become incorporated under the general law, and embrace an area of ten square miles, only two whereof were covered by the actual aggregation, was held to be void. *Ewing v. State*, 81 Tex. 172. Compare, as to Beeville, *Mathews v. State*, 82 Tex. 577. See *McCleskey v. State* (Tex. Civ. App. 1893), 23 S. W. Rep. 518.

Under the *Vermont* statutes, "town" includes city. *Vermont Rev. L.* (1880), § 19.

In *Virginia*, "town" means an incorporated town containing a population of less than 5,000; if it have 5,000 or more and a corporation or hustings court, it is a city. *Virginia Code* (1887), § 5, p. 16.

Under the *Wisconsin* statutes, "town" means a civil division composed of contiguous territory. *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189. If not repugnant to any special statutory provision, "town" may include a city, ward or district. *Wisconsin Annot. Stat.* (1886), § 4971, pl. 17. See *State v.*

unit contains thirty-six sections, each a mile square.¹ In some statutes, "township" designates a species of political corporation.²

II. CREATION.—Towns, like all other corporations, must be created by statute.³ In general, the methods of their origin or organization in different states, are not so uniform in detail as to be any more conveniently considered in some attempted classification, than successively, and in final comparison.⁴

Goldstucker, 40 Wis. 124. But compare *Beaudette v. Fond du Lac*, 40 Wis. 44. A town is not such a municipal corporation as can buy or own tax certificates. *Eaton v. Manitowoc County*, 44 Wis. 489.

1. See *SURVEYS*, vol. 24, p. 998.

2. In *Pennsylvania*, a township is a political corporation, capable of suing and being sued. *Bright. Purd. Dig. Pennsylvania Laws* (1885), p. 364, § 12. So also in *Indiana*. *Sebrell v. Fall Creek*, 27 Ind. 86. There the civil township and the "school township," though having the same limits, are not the same corporation. *Heizer v. Yohn*, 37 Ind. 415.

In *Illinois*, by the act of 1874, the adoption of township organization in any county is determined at any general election. *Illinois Rev. Stat.* (1891), p. 1486. Such organization may, on petition and election, be discontinued, p. 1489. There, a township is incorporated as a mere civil division of the state; generally not having ordinary liability as to defective highways. *Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652.

The *Illinois Acts* of 1867 and 1869, empowering "villages, cities, counties, or townships," to issue bonds in aid of the *Illinois Southeastern Railway Company*, were, by a majority of the supreme court, held not to include towns; and bonds issued by *Enfield* were held invalid. *Welch v. Post*, 99 Ill. 471.

In *Iowa*, the "civil township" is not always identical in territory with the "congressional township." *McClain's Iowa Code* (1888), § 515; *Lones v. Harris*, 71 Iowa 478.

In *Michigan*, under the constitutional requirement that counties shall not have less than sixteen "townships," a "fractional township," as surveyed by the *United States*, is also a township. *Rice v. Ruddiman*, 10 Mich. 125.

In *Colorado*, "township" refers to an involuntary or quasi corporation,

and not to an incorporated town. *Valverde v. Shattuck* (Colo. 1893), 34 Pac. Rep. 947.

In *Nebraska*, a township precinct is a mere territorial division of a county without any corporate character. *State v. Dodge County*, 10 Neb. 20.

Under the *New Jersey* road law, "township" comprehends precinct, ward, city, borough, and town corporate. *New Jersey Revision* (1877), p. 1011, § 84.

In *Ohio*, there are two classes: "original surveyed townships," and "civil" or "new townships." *Ohio Rev. Stat.* (1890), §§ 1366, 1376. The former have corporate powers for managing the ministerial and school-land sections by means of trustees, etc. §§ 1360, 1368, 1404.

3. *Galesburg v. Hawkinson*, 75 Ill. 152.

Of the form of such statute in the older states, that of *Connecticut* may serve as a general example, namely: "Territorial divisions of the state. . . . There shall be and remain in the state, eight counties, which shall be constituted as follows: The towns of . . . shall constitute one county by the name of . . ." *Connecticut Gen. Stat.* (1888), § 2. See also *New Jersey Revision* (1877), p. 1191.

As to a form where the county is the principal political unit, and the townships are laid off by the county commissioners, see *Indiana Rev. Stat.* (1888), §§ 4204, 3515, 5990.

In *Indiana*, the supreme court does not judicially know the names of the townships of a county. *Bragg v. Rush County*, 34 Ind. 405. The same is true in *Missouri*, as to whether a township organization has been adopted. *Rousey v. Wood*, 47 Mo. App. 465. In *Iowa*, otherwise. *State v. Reader*, 60 Iowa 527.

4. To undertake to study the subject by mere generalization, would be to verify the observation of a standard authority: "It is quite impossible in any brief space to convey an adequate idea of the exact nature and properties of

an American municipal corporation. There is nothing in the law more complex and abstruse." Dill, on Mun. Corp. (4th ed.), § 21.

In a brief collation of the distinctive statutory provisions hereon, those of the newer states will be found to be the more elastic, sometimes amounting to a delegated self-creation of a miniature city. In some states, a town differs from a city only in population. See *supra*, this title, *Definitions*, and note as to *Mississippi*. There, larger towns have certain privileges not conferred on the smaller. See *infra*, this title, *Governing Bodies*, note.

In *Alabama*, a town may be incorporated upon petition of twenty adult male inhabitants, to the judge of probate, who thereupon directs an election and records the result. *Alabama Code* (1886), § 1486 *et seq.* He cannot grant a second charter to a town already incorporated. *Ex p. Moore*, 62 Ala. 471. As to the requisites of incorporation proceedings, see *Butler v. Walker* (Ala. 1893), 13 So. Rep. 261.

The title of an act, "To incorporate the town of Munford," was held to include within its purview a section making it a misdemeanor to sell spirituous liquors within the corporate limits. *Ex p. Moore*, 62 Ala. 471.

In *Arizona*, cities and townships are created upon elections held under the direction of the board of county supervisors, on petition of one-half the property tax-payers. *Arizona Rev. Stat.* (1887), § 153 *et seq.*

In *Arkansas*, a town may be organized on petition of twenty qualified voters to the county judge, and a hearing thirty days afterwards. Thirty days after the recorder's transcript, if no objection shall have been made to the circuit court, three notices are posted for the election of officers. *Arkansas Dig. Stat.* (1884), § 785 *et seq.*

The fact that the judge is a resident voter does not disqualify him to act on a question of annexation. *Foreman v. Marianna*, 43 Ark. 324.

The county court may divide the county into townships, no township line to pass through a town. *Arkansas Dig.*, § 6444.

Existence of a town corporation can be questioned only at suit of the state. *Searcy v. Yarnell*, 47 Ark. 269.

In *California*, a town having not less than 500 inhabitants, may be incorporated, on petition of 100 qualified electors directed to the board of county

supervisors, hearing notice and election. Act of 1883, *California Pol. Code* (App.), p. 737.

In *Colorado*, municipal corporations are cities of two classes and towns, the latter being those of a population of 2,000 or less. *Colorado Annot. Stat.* (1891), § 4483. A town is incorporated on petition of one-eighth of the voters, notice, and election. § 4516 *et seq.* The repeal (*Colorado Gen. Laws* 1877, § 2745), of the organization law, allowed incorporated towns to retain their then existing organization. § 4532. Previously thereto, the legislature could create a municipal corporation. *Deitz v. Central*, 1 Colo. 323.

The fact that the petition to the county court to appoint commissioners to call an election for town incorporation, was obtained secretly, was held immaterial. So also was the fact that the proposed territory did not exceed sixteen acres. *Guebelle v. Epley*, 1 Colo. App. 199.

In *Connecticut*, towns have no original or self-creative power. Hartford, Weathersfield, and Windsor were not municipal corporations until so made by a legislative act passed in 1639, under the constitution of that year. *Webster v. Harwinton*, 32 Conn. 131.

In the *Dakotas*, in order to incorporate a town, the plat must be accompanied by the affidavit of the surveyor, a census be taken, and a petition be made by one-third of the qualified voters, to the county commissioners; the board causes ten days' notice of a decisive meeting of the voters. The inspectors of election make return, and if incorporation be voted, apportion the population into districts and call an election of officers. *Dakota Comp. Laws* (1887), § 1022 *et seq.* Any town so specially incorporated may amend its charter at an election called upon a petition addressed to the board of trustees. *South Dakota Sess. Law* (1891), p. 213.

In *Florida*, twenty-five male inhabitants are necessary for the incorporation of a town, village, or hamlet. *Florida Rev. Stat.* (1892), § 658.

Over the same territory and at the same time, there may be a *de facto* corporation without right, and a legally organized corporation whose functions are in abeyance. *State v. Winter Park*, 25 Fla. 571. For an action to arrest the usurpation of a municipal franchise, see *Robinson v. Jones*, 14 Fla. 256.

In *Georgia*, when there are twenty-five male inhabitants, a majority may

petition the superior court, and upon notice and election therefor, become incorporated as a town. *Georgia Code* (1882), § 775 *et seq.*

As to the requisites of procedure in town incorporation, see *Dunden v. Toombsboro*, 81 Ga. 353.

In *Idaho*, towns are incorporated on petition of the taxable male inhabitants to the county commissioners, setting forth the metes and bounds not over six miles square. The board, if "satisfied that the prayer is reasonable," may "declare such town incorporated." *Idaho Rev. Stat.* (1887), § 2224.

In *Illinois*, a county may adopt township organization on petition of fifty legal voters to the county board, election, division by three commissioners into towns, etc. *Illinois Rev. Stat.* (1891), p. 1486 *et seq.*

Under the *Illinois Act* of 1845, if the plat is recorded before the town has a corporate existence, the fee remains in abeyance, subject to vest in the corporation as soon as created. An omission in the plat to designate a corner-stone, as required by the statute, is not fatal, if the streets, etc., can be ascertained from other monuments therein, with equal certainty. *Gebhardt v. Reeves*, 75 Ill. 301.

The incorporation of Tamaroa, *Illinois*, in 1859, "with all the rights," etc., "conferred on the town of Havana by the act approved Feb. 12th, 1853," was held not to include a power conferred upon Havana in 1857 by an act amending that of 1853. *Tatum v. Tamaroa*, 9 Biss. (U. S.) 475; 14 Fed. Rep. 103.

Mandamus lies to compel a village council to call an election for a change from special to general incorporation. *Glencoe v. People*, 78 Ill. 382.

As to what, under the original act, was a "majority of the voters," requisite for township organization, see *People v. Brown*, 11 Ill. 478. Further, as to requisites of procedure for township organization, see *People v. Garner*, 47 Ill. 246.

In *Indiana*, a town may be incorporated on making public a certified survey, map and census, and application to the board of county commissioners; election, etc. *Indiana Rev. Stat.* (1888), § 3293 *et seq.* As to township organization, see § 5987 *et seq.*

For requisites of town incorporation, see *State v. Arnold*, 38 Ind. 41.

The exercising of unquestioned corporate powers by a town for twenty years is held to preclude a private

party's questioning its incorporation. *Worley v. Harris*, 82 Ind. 493.

In *Iowa*, the procedure for town incorporation is by petition of twenty-five qualified electors directed to the proper court, with plat, proof of population, etc. Thereupon the court appoints five commissioners, who call an election, and cause certified copies of the record, etc., to be filed in the offices of the county recorder and secretary of state. *McClain's Iowa Code* (1888), § 569 *et seq.* This is not an unconstitutional delegation of power to the courts. *Ford v. North Des Moines*, 80 Iowa 626. There, moreover, a town may abandon a special charter and reorganize on petition of fifty legal voters directed to the trustees, election, etc. *McClain's Iowa Code* (1888), § 587 *et seq.*

Irregularities in the first election of its officers are held to be no ground for questioning the town's political existence, or to affect the validity of the election or acts of the subsequently elected officers. *Lones v. Harris*, 71 Iowa 478.

In *Kansas*, as to the platting, etc., of towns, see *Kansas Gen. Stat.* (1889), § 4008.

In *Kentucky*, "the county court of each county, on the application of the ostensible owner, if it deem the same advantageous and necessary to the public at large, may establish a town, and thereby vest the title of a designated tract of land in trustees and their successors for that purpose. A plat is recorded in the county clerk's office, and the lots are sold at auction by the trustees. The applicant gives the court a bond against defect of title. *Kentucky Gen. Stat.* (1887), p. 1236.

The trustees cannot convey streets and alleys. *Covington v. McNickle*, 18 B. Mon. (Ky.) 262.

In *Louisiana*, the act of 1880 for amendment of town charters, does not authorize the extension of privileges or the diminution of the parish authority. *Cook v. Dendinger*, 38 La. Ann. 261.

In *Maine*, the town corporate body consists of every male resident of full age; his consent is immaterial. *Lord v. Chamberlain*, 2 Me. 69; *Richmond v. Vassalborough*, 5 Me. 396; *Colson v. Bonzey*, 6 Me. 474.

The maxim, *omnia rite præsumuntur*, applied, after a lapse of fifty years, to the regularity of proceedings to organize a plantation for town purposes. *Prentiss v. Davis*, 83 Me. 364.

In *Maryland*, the county is the principal unit, and her public local laws (embracing municipal charters) were, in 1888, published in the alphabetical order of the counties. For a good representative thereof, see the amended charter of Hagerstown. *Maryland* Sess. Laws (1892), p. 34 *et seq.*

In *Massachusetts*, after consent had in town meetings, the legislature can erect a municipal government in a town having 12,000 inhabitants. *Massachusetts* Const. Am., art. 2.

See *Larcom v. Oljn* (Mass. 1893), 35 N. E. Rep. 113, where the *Massachusetts* constitution as to the change of a town to a city is construed.

In *Michigan*, as to procedure in the creation of a township by the county board, see *Michigan* Gen. Stat. (1882), § 488. A township's corporate existence may be established by proof of many years' acquiescence in taxation, use of franchises, etc., as much as by proof of regular origination. *People v. Maynard*, 15 Mich. 473.

In *Minnesota*, a congressional township may be organized as a town on petition of twenty-five legal voters to the county commissioners, who thereupon fix the boundaries, name it and file a report with the county auditor. *Minnesota* Gen. Stat. (1891), § 1077.

In *Mississippi*, towns are created, the same as cities. See *supra*, this title, *Definitions*, note.

In *Missouri*, as to the procedure for township organization, see *Missouri* Rev. Stat. (1889), § 8424 *et seq.* There, courts will not take judicial notice of the adoption of township organization; it must be established by extrinsic evidence. *Spurlock v. Dougherty*, 81 Mo. 171; *Rousey v. Wood*, 47 Mo. App. 465. The validity of a town charter can be contested only by a *quo warranto*. *Kayser v. Bremen*, 16 Mo. 88. As to the evidence of a town's incorporation, see *Sellick v. Fayette*, 3 Mo. 99.

In *Montana*, the county board may, on a petition of fifty residents, organize a new township. *Montana* Comp. Stat. (1888), p. 845, § 757. On petition of a majority of the legal voters, the board may change the township organization of the county, § 758. The board must cause a plat of the new township to be made and filed in the office of the secretary of state, §§ 769, 773.

In *Nebraska*, as to the procedure by the county board, see *Nebraska* Con-

sol. Stat. (1891), § 916. As to the construction of the *Nebraska* Township Organization acts of 1879 and 1891, see *Albert v. Twohig*, 35 Neb. 563.

Only where a *bona fide* contract cannot otherwise be enforced will a municipal corporation be held to have been created by implication. Thus, the *Nebraska* statute empowering the county commissioners to issue special bonds for a precinct did not import its corporation. *Citing* 1 Dill. on Mun. Corp., § 22; *Jordan v. Cass County*, 3 Dill. (U. S.) 185; *Blair v. West Point Precinct*, 2 McCrary (U. S.) 459.

In *Nevada*, as to the procedure by the county board, see *Nevada* Gen. Stat. (1885), §§ 2024, 2079.

In *New Hampshire*, a mistake in a township charter cannot be corrected by a court in a suit between individuals. *Enfield v. Permit*, 5 N. H. 280. A quasi corporation for the sale and partition of lands does not create a statutory town. *Wells v. Burbank*, 17 N. H. 393.

A mistake in a township charter cannot be corrected by a court of law in a suit between individuals. *Enfield v. Permit*, 5 N. H. 280.

In *New Jersey*, as to the requisites for the incorporation of a village under the *New Jersey* Act of 1891, see *State v. Van Valen* (N. J. 1893), 27 Atl. Rep. 1070.

In *New Mexico*, as to proclamation, election, and other procedure for town organization or reorganization, see *New Mexico* Comp. L. (1884), § 1692 *et seq.*

In *New York*, as to the formation of a new town by the supervisors, clerk and assessors, see *Bird* *New York* Rev. Stat. (1890), p. 930, § 32.

The *New York* Act of 1847, authorizing the electors of a village to adopt into their charter any section of the general act, was held constitutional. *Bank of Chenango v. Brown*, 26 N. Y. 4675.

The statutory method for determining the validity of a village incorporation, is exclusive of any other proceeding. *Gardiner v. Christian*, 70 Hun (N. Y.) 547.

In *North Carolina*, the county commissioners may, on petition of three freeholders of each township to be affected, and on notice and hearing, "erect a new township or divide an existing township, or change the name, or alter the boundaries thereof." *North Carolina* Code (1883), § 707, pl. 14. A grant

of town commons, *ipso facto*, creates a town body politic for the purposes thereof. *Bath v. Boyd*, 1 Ired. (N. Car.) 194; *Trenton v. McDaniel*, 7 Jones (N. Car.) 107.

In *Ohio*, as soon as there are four electors in a township, or fractional township having a section 29 or 16 reserved, etc., the same may become incorporated, on petition to the county commissioners; hearing, etc. *Ohio Rev. Stat.* (1890), § 1360. For a classification of municipal corporations, see *Ohio Rev. Stat.* (1890), § 1546.

In *Oklahoma*, as to proceedings of the county commissioners for the incorporation of towns, see *Oklahoma Stat.* (1890), § 665 *et seq.*

In *Pennsylvania*, new townships may be erected by the courts of quarter sessions, on petition; commission to "three impartial men;" election, etc. *Bright. Purd. Pennsylvania Dig. L.* (1885), p. 371. As to the procedure and requisites in the erection thereof, see *Com. v. Fullerton*, 12 Pa. St. 266; *Ryon Tp.*, 24 Leg. Int. (Pa.) 272; 1 Walk. (Pa.) 137.

For the requisites of procedure in incorporating a borough that shall include part of another, see *Darby v. Sharon Hill*, 112 Pa. St. 66.

In incorporating a borough, the statutory requirements must be strictly complied with. The foreman's endorsement, "approved," is held to be an insufficient certificate of the grand jury. *In re Summit*, 114 Pa. St. 362. So also as to the division of a borough into wards. *Brown v. Fowzer*, 114 Pa. St. 446.

In *South Carolina*, as to the procedure in the county commissioner's change of name of any township, see *South Carolina Gen. Stat.* (1882), § 641.

In *Rhode Island*, "the inhabitants of every town shall continue to be a body corporate," etc. *Rhode Island Pub. Stat.* (1882), p. 101, § 1.

In *Tennessee*, a municipality may be incorporated on application to the clerk of the county court, or nearest resident justice, of fourteen freeholders, with a list of possible voters, notification, election, etc. *Tennessee Code* (1884), § 1575 *et seq.* The town incorporation law of 1849 does not contravene *Tennessee Const.*, art. 11, § 7, as a delegation of the legislature's powers. *Morristown v. Shelton*, 1 Head. (Tenn.) 24.

In *Texas*, a town or village, when containing more than 200, or less than 10,000 inhabitants, may be incorporated on the petition of twenty resident vot-

ers, filed in the county court; election, etc. *Texas Rev. Civ. Stat.* (1889), art. 506 *et seq.*

For statutory requisites of town reorganization as to population, etc., see *Harness v. State*, 76 Tex. 566.

In *Utah*, a town with a population of not less than 300 may be incorporated on petition of a majority of the taxpayers, directed to the county court, setting forth the boundaries, etc. *Utah Comp. L.* (1888), § 1819.

In *Vermont*, as to the procedure for town organization, see *Vermont Rev. L.* (1880), § 2654. As to notice of petition to the general assembly for the creation of a new town, see § 129. A town's legal organization may be presumed from proof of long action as such, appointment of officers, etc. *Londonderry v. Andover*, 28 Vt. 416.

In *Washington*, any portion of a county containing not less than 300 inhabitants, and not incorporated, may become incorporated on petition of sixty resident electors to the county board; election, etc. *Washington Gen. Stat.* (1891), § 493 *et seq.*

In *Virginia*, as to the survey, etc., of towns, see *Virginia Code* (1887), § 1014.

The *West Virginia* constitution inhibits local or special legislation for incorporating any city, town or village, or for amending the charter of any containing a population of less than 2,000. *West Virginia Code* (1891), p. 32. Any district of not less than one quarter of one square mile, and not included within any incorporated town, village, or city, and containing not less than a hundred inhabitants, may become incorporated on notice, and petition to the circuit court, with map, etc., p. 421 *et seq.*

In *Wisconsin*, as to the organization of towns by the county supervisors, see *Wisconsin Annot. Stat.* (1889), § 670. The validity of the organization is beyond question after two years, § 674.

The legislature may constitutionally restrict an act of incorporation to towns containing villages of a certain population. *Land, etc., Co. v. Brown*, 73 Wis. 294.

In *Wyoming*, territory not in any municipality and having not less than 300 residents, and in area not over two square miles, may be incorporated on petition of not less than a majority of the electors, to the county board, setting forth the boundaries, etc. *Wyom-*

If the powers conferred upon residents of a town or district cannot be carried into effect without acting in a corporate capacity, a corporation is, to this extent, created by implication.¹

III. BOUNDARIES; DIVISIONS—1. In General.—Before the adoption of the governmental system of surveys, the boundaries of towns and townships were fixed by the general or special statute creating them.² In the states thereafter admitted, the boundaries of the territorial township were governed thereby; and those of the political township were generally identical therewith.³ But towns and cities are often incorporated with no regard to townships.⁴ The statutory provisions of the older and the younger states are diverse as to the monuments for designating town lines, the means of their perpetuation, perambulating, processioning, etc.⁵

ing Rev. Stat. (1887), § 445 *et seq.*, Amendment Sess. L. (1890), ch. 25 (1891), ch. 89.

1. So held as to a paving contract by the village of Carlsbad. *State v. Van Valen* (N. J. 1893), 27 Atl. Rep. 1070, *citing* 1 Dill. on Mun. Corp., § 42, and Fourth School Dist. v. Wood, 13 Mass. 193.

2. See *supra*, this title, *Creation*.

3. See SURVEYS, vol. 24, p. 998.

4. See MUNICIPAL CORPORATIONS, vol. 15, p. 958; BOUNDARIES, vol. 2, p. 499.

5. See SURVEYS, vol. 24, p. 1008.

In *Alabama*, ancient municipal boundaries that have ceased to be marked by visible boundaries, may be established by general reputation. *Morgan v. Mobile*, 49 Ala. 349. Further, as to boundaries, see *Luverne v. Shows* (Ala. 1893), 13 So. Rep. 509.

In *Arkansas*, no township line shall pass through any town. *Arkansas Dig. Stat.* (1884), § 6444.

In *Connecticut*, a town must set out its bounds "by a large heap of stones, or a ditch six feet long and two and a half feet wide, of ordinary depth;" a borough, by stone pillars, etc. Quinquennially the selectmen of adjoining towns, and the wardens and burgesses of each borough shall cause the lines to be perambulated, and the monuments to be renewed. In case of their disagreement as to the place of a divisional line, the superior court shall appoint a committee to fix it. *Connecticut Gen. Stat.* (1888), § 182 *et seq.*

In *Illinois*, after a county has voted to adopt township organization, the county board appoints three commissioners who divide the county into

towns, "making them conform to the townships according to government surveys. . . . When a creek or river so divides a township that it is inconvenient for transacting town business, then such creek or river may be made the town boundary, and the fractions so formed may be disposed of as other fractional townships." *Illinois Rev. Stat.* (1891), p. 1487.

By the act of 1889, the county board may, on certain notice and hearing, alter town boundaries to suit the convenience of the inhabitants; but each new town must have not less than ten square miles, nor less than fifty legal voters. *Illinois Stat. Supp.* (1892), p. 1266.

The act of 1887, amending that of 1874, is within the scope of the title as to uniting towns or transferring territory. *Donnersberger v. Prendergast*, 128 Ill. 229.

The act of 1883, adapting the general town system to territory under city organization, is valid. *People v. Hazelwood*, 116 Ill. 319.

In *Indiana*, marking streets upon the plat of a town, or an addition thereto, and a sale of lots with reference thereto, may import a dedication. *Wolfe v. Sullivan*, 133 Ind. 331.

In *Iowa*, "The board of supervisors of each county shall divide the same into townships, as the convenience of the citizens may require, accurately defining the boundaries of the townships, as it may deem proper; provided, however, that if the congressional township lines are not adopted and followed, the board of supervisors shall not change the lines of any civil township so as to divide any school district, or

sub-district, unless a majority of the voters of such district or sub-district shall petition therefor. McClain's *Iowa Code* (1888), § 516; *Lones v. Harris*, 71 *Iowa* 478.

A municipality, which for thirty years subjected land platted as streets and a public square to taxation as private property, was held estopped to claim title thereto. *Smith v. Osage*, 80 *Iowa* 84, citing *Simplot v. Dubuque*, 49 *Iowa* 630; *Getchell v. Benedict*, 57 *Iowa* 121; *Waterloo v. Union Mill Co.*, 72 *Iowa* 437; *Pella v. Scholte*, 24 *Iowa* 283; 95 *Am. Dec.* 729.

In *Kansas*, the statutory procedure for platting controls, and no acts of third parties will effect a division into blocks and lots. *Sullivan v. Davis*, 29 *Kan.* 28.

In *Louisiana*, the rule that, on the division of a municipal corporation into two separate communities, each holds in severalty the public property that falls within its limits, was applied to a parish courthouse in the town of Floyd, on carving the parish of West Carroll out of Carroll. *West Carroll Parish v. Gaddis*, 34 *La. Ann.* 928.

In *Maine*, municipal officers shall cause town lines to be perambulated quinquennially, with the exception of "towns which since March 22d, 1828, have perambulated, or shall perambulate their lines as by law prescribed, and set up stone monuments, at least two feet high, at all the angles, and where the lines cross highways, or on or near the banks of all rivers, bays, lakes or ponds which said lines cross, or which bound said lines, except once every ten years, commencing ten years from the time that the stone monuments were so erected." *Maine Rev. Stat.* (1883), p. 88. The proceedings of commissioners appointed to ascertain a town line, were held to be only presumptive evidence of the actual boundary. *Magoon v. Davis*, 84 *Me.* 178.

A township bounded easterly and northly on Schoodic river, carries the grant to the middle thread above tide-water. *Granger v. Avery*, 64 *Me.* 292.

The record of a meeting for organization of a plantation for township purposes, need be only as explicit in description of limits as that in a deed by the state. *State v. Woodbury*, 76 *Me.* 457. As to procedure in establishing town boundaries, see *Anonymous*, 31 *Me.* 592.

In *Massachusetts*, as in *Maine*, the selectmen cause town lines to be per-

ambulated quinquennially, and erect monuments. *Massachusetts Pub. Stat.* (1882), p. 226.

As to a common boundary of towns being the middle of a stream, see *Flynn v. Boston*, 153 *Mass.* 372. As to a boundary upon flats, tidewaters, etc., see *Tappan v. Boston Water Power Co.*, 157 *Mass.* 24; *Russ v. Boston*, 157 *Mass.* 60.

In *Michigan*, as to the requisites of the laying out of a township line road, see *Michigan Gen. Stat.* (1882), § 1305; *Brewer v. Gerow*, 83 *Mich.* 250.

In *Missouri*, where the charter of a municipality is amendable by "the law-making authorities" thereof, a change made by them in the boundaries fixed in the charter, constitutes an amendment of the charter. *Westport v. Kansas City*, 103 *Mo.* 141.

A false description in an order of the county court incorporating a town—e. g., "Section 24," instead of "Section 23"—may be stricken out, provided enough remains to ascertain the location. *Woods v. Henry*, 55 *Mo.* 560.

In *Montana*, the county commissioners may "change the boundaries of townships in their respective counties." *Montana Comp. Stat.* (1887), p. 845, § 756.

In *Nebraska*, when a surveyed township shall have too few inhabitants for a separate organization, it may be added to some adjoining town, or temporarily divided between two or more towns; and a creek or river so dividing a township as to make it inconvenient for transacting town business may be made the town boundary. *Nebraska Consol. Stat.* (1891), § 949.

In *New Hampshire*, the town lines are septennially perambulated by the selectmen. Where a place on a county line is unorganized, the county commissioners perambulate. *New Hampshire Pub. Stat.* (1891), p. 173. As to the procedure, see *Boscawen v. Canterbury*, 23 *N. H.* 188; *Campton v. Holderness*, 25 *N. H.* 225; *Gorriell v. Whittier*, 3 *N. H.* 267. As to the determination of the true boundary of a town from records of ancient perambulations, see *Wells v. Jackson Iron Mfg. Co.*, 48 *N. H.* 491.

In *New York*, as to special surveys of town bounds, see *Bird. New York Rev. Stat.* (1890), p. 2759, § 3.

In *Ohio*, the marked corner is controlled by the actual division lines. *Reed v. Marsh*, 8 *Ohio* 147. As to the requisites of the petition to change township boundaries, see *Russell v.*

2. Enlargement; Severance—*a.* IN GENERAL.—The statutory and the constitutional provisions of the different states concerning consolidation of municipalities, and the addition and subtraction of town territory, are not alike; nor are the adjudications thereon uniform, especially as to the proper limit of legislative interference.¹

Fulton County, 6 Ohio Cir. Ct. Rep. 185.

In *Oklahoma*, as to the survey, plating and registration of towns, see *Oklahoma Stat.* (1890), § 732 *et seq.*

In *Pennsylvania*, township boundaries may be altered by the courts of quarter sessions, on petition; commission to "three impartial men;" election, etc. Bright. *Purd. Dig. L.* (1885), p. 371. As to the procedure and requisites in the alteration, see *In re Henderson Tp.*, 2 Watts (Pa.) 269; *In re Harrison Tp.*, 5 Pa. St. 447; *In re Lime-stone Tp.*, 11 Pa. St. 270; *In re Norwegian Tp.*, 20 Pa. St. 324; *In re Clay Tp.*, 33 Pa. St. 366; *In re Wetmore Tp.*, 68 Pa. St. 340; *In re Line*, 4 Lanc. L. Rev. (Pa.) 269; *In re Exeter Tp.*, 8 Co. Ct. Rep. (Pa.) 524. For requisites of establishment of township lines, see *In re Plunkett's Creek Tp.*, 148 Pa. St. 299.

In *South Carolina*, the county commissioners may change the name of any township in their county. *South Carolina Gen. Stat.* (1882), § 641. As to the proper riparian boundary, under a statute's direction to commissioners to lay off, for a town, a tract two miles square on a certain river, see *State v. Columbia*, 27 S. Car. 137.

In *Utah*, an owner of land may get it surveyed, platted, etc., and "such maps and plats when made, acknowledged, filed and recorded with the county recorder, shall be a dedication of all such avenues, streets, commons, or other public places or blocks, and sufficient to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses for the inhabitants of such town and for the public, for the uses therein named or intended. If any person shall sell or offer for sale any lot so platted according to said plat within any town or addition, before the map or plat thereof is made out, acknowledged, filed and recorded as aforesaid, such person shall forfeit to the county in which such town or addition is located, a sum not exceeding \$300, for every lot which he shall sell." *Utah Sess. L.* (1890), ch.

50. The name of a town may be changed on petition of three-fourths of the legal voters. *Sess. L.* (1888), ch. 21.

In *Vermont*, as to the duties of the selectmen in adjusting a divisional line, see *Vermont Rev. L.*, § 2755 *et seq.* Recognition by adjoining proprietors, for twenty years, of a stone wall as the town line, was held not to bind the towns. *Smith v. Rockingham*, 25 Vt. 645. See requisites of description of village boundaries, in *Cutting v. Stone*, 7 Vt. 471. For requisites of procedure to establish a divisional line between towns, see *Somerset v. Glastenbury*, 61 Vt. 449.

In *Virginia*, the recorded plan of a town "shall be evidence of the boundaries of the lots, streets and alleys thereof." *Virginia Code* (1887), § 1014.

In *Washington*, as to the procedure in vacating part of a town plat, see *Washington Gen. Stat.* (1891), § 749.

In *West Virginia*, the name of a town or village may be changed on petition to the county court, notice and hearing. *West Virginia Code* (1891), p. 1025.

In *Wisconsin*, the *United States* surveys govern in proving the areas of townships. *Wisconsin Annot. Stat.* (1889), § 4196.

1. See MUNICIPAL CORPORATIONS, vol. 15, pp. 1008, 1013.

In *Alabama*, the name or boundaries of a town may be changed on petition of ten adult male inhabitants thereof to the judge of probate. *Alabama Code* (1886), § 1516.

The policy of a change of boundaries by the general assembly cannot be inquired into by the courts. *Scruggs v. Huntsville*, 45 Ala. 220.

In *Arkansas*, the act vesting the power in the courts has been upheld. *Foreman v. Marianna*, 43 Ark. 324. Only residents or property owners of the old town or of the territory sought to be annexed, can petition for *certiorari* thereon. *Perkins v. Holman*, 43 Ark. 219.

The legislature may amend town charters, extend or reduce the boundaries, and divide, consolidate, or abolish,

according to public convenience and with the consent of the body politics. *Eagle v. Beard*, 33 Ark. 497.

The *Arkansas* Act of 1873, assuming to cut off "Du Val's addition" to Little Rock, was held to be unconstitutional. *Little Rock v. Parish*, 36 Ark. 166.

For the construction and effect of the *Arkansas* Act of 1875, as to annexation of contiguous territory to a town, see *Dobson v. Fort Smith*, 33 Ark. 508.

As to procedure upon annexation, see *Gunter v. Fayetteville*, 56 Ark. 202; *Vogel v. Little Rock*, 55 Ark. 609; *Woodruff v. Eureka Springs*, 55 Ark. 618.

In *California*, as to legislative control of the matter, see *Santa Rosa v. Coulter*, 58 Cal. 537.

As to the requisites of procedure on change of municipal boundaries, see *Wiedwald v. Dodson*, 95 Cal. 450.

In *Colorado*, as to the annexation of contiguous towns, see *Colorado* Sess. L. (1893), ch. 156; also *Valverde v. Shattuck* (Colo. 1893), 34 Pac. Rep. 946.

In *Connecticut*, as to the effect of the division of a town upon a pauper's settlement, see *East Hartford v. Hunn*, 29 Conn. 500.

As to extending city limits, see *Randell v. Bridgeport*, 62 Conn. 440.

The town of East Haven, shortly before the chartering of the borough of Fair Haven East, so constructed a highway, afterwards within the borough, and filled an excavation with stones, that surface water finally overflowed and damaged an abutter's cellar. It was held that the borough could not be adjudged liable therefor without proof of its knowledge of the nuisance. *Morse v. Fair Haven East*, 48 Conn. 220.

In the *Dakotas*, as to the procedure under *Dakota* Comp. L., § 705, for division of townships having two or more villages, see *Territory v. Armstrong*, 6 Dak. 226.

In *Florida*, as to the power of the county board in the matter, see *Pensacola v. Louisville*, etc., R. Co., 21 Fla. 492. As to legislative control, see *Saunders v. Pensacola*, 24 Fla. 226. As to the procedure for the contraction or expansion of a town, see *Florida* Dig. L. (1881), pp. 254-5.

In *Idaho*, "The board of trustees or council may, by ordinance, include in the corporate limits of the city or town, all territory contiguous or adjacent

thereto which has been at any time, by the owner or proprietor thereof, or by anyone by his authority or acquiescence, laid off or subdivided into lots or blocks containing not more than five acres of land each, whether the same shall have been so laid off, subdivided, or platted in accordance with any statute of this state or otherwise;" and the board may compel such owners to lay out streets, etc., corresponding in width, direction, etc. *Idaho* Am. Rev. Stat., § 2238; Sess. Laws (1891), p. 159.

In *Illinois*, on petition of three-fourths of the legal voters and of the owners of three-fourths in value of the property in any territory contiguous to any incorporated town, the board of trustees may, by ordinance, annex such territory, on filing the ordinance with a certified map in the county recorder's office. *Illinois* Rev. Stat. (1891), p. 265, § 200. Incorporated towns may be annexed to each other, § 201. A hearing may be had, and an appeal from the decision of the board may be heard, by a court or by a jury of non-residents, § 202 *et seq.* The act of 1889 provides for the procedure on petition to the county court for an election, p. 268, § 210a *et seq.* As to payment of the corporation debts, see § 210d. As to change of name, see p. 269, n. As to division of incorporated towns, see p. 269j *et seq.* As to the power of the county board to enlarge and divide towns, see p. 1490, § 26. As to legislative control generally, see *Covington v. East St. Louis*, 78 Ill. 548; *People v. Couchman*, 15 Ill. 142.

Where, upon change of Quincy under the *Illinois* Act of 1877, authorizing the organization of township territory into towns, the territory was found co-extensive, a majority of the court held that the city treasurer might be town collector. *People v. Hazelwood*, 116 Ill. 319.

As to the requisites of procedure in dividing towns, see *Woo-Sung v. People*, 102 Ill. 648.

On division under the *Illinois* Act of 1874, both the resulting towns become new ones, and each must contain at least seventeen square miles. *Jefferson v. People*, 87 Ill. 503.

A village is not exonerated from liability for the unsafe condition of a bridge, by the wrongful act of the town highway commissioners. *Marselles v. Howland*, 23 Ill. App. 101.

An election under an unconstitutional enabling act, was held inopera-

tive of town annexation. *Hyde Park v. Chicago*, 124 Ill. 156.

Under the rule that, in the absence of a contrary provision, upon the annexation of part of a township to a city, the residue retains its property, the *Illinois* Act of 1869, extending the western limits of Chicago, left the rents, issues and profits of Section 16, Tp. 39, to be administered by the trustees of schools thereof for their own uses. *People v. School Trustees*, 86 Ill. 613.

In *Indiana*, as to legislative control, and as to annexation of platted lots under the act of 1852, see *Jeffersonville v. Weems*, 5 Ind. 547; *Taylor v. Fort Wayne*, 47 Ind. 274; *Stilz v. Indianapolis*, 55 Ind. 515; *Cicero v. Williamson*, 91 Ind. 541; *Terre Haute v. Beach*, 96 Ind. 143; *Logansport v. La Rose*, 99 Ind. 117; *Strosser v. Fort Wayne*, 100 Ind. 443; *Delphi v. Startzman*, 104 Ind. 343; *Huff v. La Fayette*, 108 Ind. 14; *Wiley v. Bluffton*, 111 Ind. 152.

In *Indiana*, a town and a city may be consolidated upon an agreement between the city council and the town trustees' president, as to the conditions, and an election in favor of the annexation. *Indiana* Rev. Stat. (1888), § 3233 *et seq.* "In proceedings before the county commissioners for the annexation of territory to cities and towns, against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed may appeal to the circuit court," pending which, the proceedings are to be suspended. § 3243 *et seq.* As to the disannexation of suburban tracts, see § 3248. As to construction of the statutes upon annexation, see *Elston v. Crawfordsville*, 20 Ind. 272.

On severance, each township holds in severalty, public property within its territorial limits, and money, choses in action, etc., are to be equitably divided. *Towle v. Brown*, 110 Ind. 65.

In *Iowa*, a township of 1,500 inhabitants may be divided by the county board on petition, notice, hearing, etc. *McClain's Iowa Code* (1888), § 519. The county board, if it refuses a proper petition, may be compelled to make the division. *Henry v. Taylor*, 57 Iowa 72. As to the procedure for annexation, see *McClain's Iowa Code* (1888), § 579. As to severance, see § 593; and *McKean v. Mt. Vernon*, 51 Iowa 306. As to legislative control, see *Murford v. Unger*, 8 Iowa 82; *Buel v. Ball*, 20 Iowa 282; *Deeds v. Sanborn*, 22 Iowa 214; *Tubbesing v. Burlington*, 68 Iowa 691; *Ford*

v. North Des Moines, 80 Iowa 626. As to the effect on homestead rights, see *Finley v. Dietrick*, 12 Iowa 516; *Truax v. Pool*, 46 Iowa 256.

Severance in the business portion of a town was held properly refused. *Monk v. George* (Iowa 1892), 53 N. W. Rep. 240. Annexation of territory in another county was held unauthorized. *Tabor, etc., R. Co. v. Dyson* (Iowa 1892), 53 N. W. Rep. 245.

Severance of two villages whose centers were a mile apart, was held to be properly granted. *Ashley v. Calliope*, 71 Iowa 466.

A town ordinance prohibiting the sale of intoxicating liquors "within the limits of said town," passed before the act extending jurisdictions of towns two miles beyond their limits, was held to apply to the extension. *Toledo v. Edens*, 59 Iowa 352.

In an agreement for division of a district township, a provision that it draw all the "fund due," was held to embrace assets thereafter to become available; *c. g.*, a railroad tax, assessment thereof had been omitted by mistake. *Jasper D. Tp. v. Sheridan D. Tp.*, 47 Iowa 183.

As to requisites of municipal extension, see *Glass v. Cedar Rapids*, 68 Iowa 207.

In *Kansas*, as to the necessity of contest, see *Topeka v. Gillett*, 32 Kan. 431. As to the effect on homestead rights, see *Emporia v. Smith*, 42 Kan. 433. As to when the enlargement does not extend a county seat, see *State v. Atchison County*, 44 Kan. 186. An ordinance adding lands not properly subdivided, was held void. *Stewart v. Adams*, 50 Kan. 560.

In *Kentucky*, additions may be made to towns, upon advertisement and application to the county court, the order whereof "shall vest the title of the land so added in the trustees of the town," *Kentucky* Gen. Stat. (1887), p. 1242. But see *Courtney v. Louisville*, 12 Bush. (Ky.) 419, as to constitutional restriction of unequal compulsory taxation. On petition of town trustees, the county court may cause streets to be extended to a river near the town, p. 1242. As to legislative control, see *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Sharp v. Dunavan*, 17 B. Mon. (Ky.) 223.

In *Louisiana*, as to legislative control, see *Stoner v. Flournoy*, 28 La. Ann. 850.

In *Maine*, on severance, the original

town retains all its property, powers, rights, and obligations, unless otherwise provided in the act of separation. *North Yarmouth v. Skillings*, 45 Me. 133; 71 Am. Dec. 530; *Frankfort v. Winterport*, 54 Me. 250. As to the rights of election by any resident as to which town he will belong, upon the division line being drawn, see *Blanchard v. Cumberland*, 18 Me. 113. Conveyance of a suburban lot with reference to a plat, passes an easement in the streets, which neither the plat nor his successors can interrupt or destroy. *Bartlett v. Bangor*, 67 Me. 460.

A legislative provision assigning absentees to the town to which the fractional part was to be annexed, was held valid. *Wilton v. New Vineyard*, 43 Me. 315.

A privilege in the provision law for dwellers on the line to elect to which town their land should belong, was held to be a definitive and perpetual change of the line of territorial jurisdiction. *Cumberland v. Prince*, 6 Me. 410.

A town's duty to construct a highway as decreed by the county commissioners, is not affected by a severance incorporating that district into a new town. *Page's Petition*, 37 Me. 553.

In an act of severance, the words, "all paupers whose legal settlement is upon said territory," was held to mean only those then actually chargeable as paupers. *Castine v. Winterfort*, 56 Me. 319.

In *Maryland*, in *Prince George County v. Bladensburg*, 51 Md. 468, the court, by Irving, J., said: "It is certainly not within the power of the legislature to give to a municipal corporation the power of absorbing as much of the property, and as many of the people, of a county, as it may suit the wishes of the municipal authorities to make subjects of their taxation and ordinances."

In *Massachusetts*, the legislature can erect a municipal government in a town containing 12,000 inhabitants, after consent had in town meeting. *Massachusetts Const. Am.*, art. 2. This does not apply to annexation of a town to a city. *Chandler v. Boston*, 112 Mass. 200. It is no obstacle that the annexed portion lies in another county. *Justices' Opinion*, 6 Cush. (Mass.) 578. But no right of representation must be suspended. *Warren v. Charlestown*, 2 Gray (Mass.) 84. There, an annexation act may take effect for different

purposes at different times. *Stone v. Charlestown*, 114 Mass. 214.

Upon severance, in absence of contrary provision, lands held for public uses go to the town within whose limits they fall. *Lynn v. Nahant*, 113 Mass. 433. As to the effect on the title to flats and seashore, see *Com. v. Roxbury*, 9 Gray (Mass.) 451. The severance does not necessarily effect severance of the judicial district of a district court. *Com. v. Brennan*, 150 Mass. 63. As to the proportionate division of indebtedness, and the remedy to get the excess reimbursed, see *Brewster v. Harwich*, 4 Mass. 278.

In the absence of express contrary provision, the old town retains all its property, powers, and privileges. *Windham v. Portland*, 4 Mass. 384; *Richards v. Dagget*, 4 Mass. 539; *Minot v. Curtis*, 7 Mass. 441; *Hampshire v. Franklin County*, 16 Mass. 86.

Where part of a town was incorporated as a new town, a pauper whose then residence could not be ascertained, was held chargeable to the old town. *Westport v. Dartmouth*, 10 Mass. 341.

Acquiescence for eighty years, was held to ratify annexation proceedings. *Cobb v. Kingman*, 15 Mass. 197.

Town division was held not to vacate an equity suit by the old town as to a highway falling within the new town. *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63.

The *Massachusetts Act of 1772*, having provided for the incorporation of twelve persons as overseers of the town of Boston, and the act of 1822 changing the town to a city, having provided for the election of a board of overseers for the city, "who shall have all the powers, and be subject to all the duties, now appertaining to the overseers of the poor for the town of Boston," it was held that this was a continuance and not a dissolution or suspension of the corporation of 1772; that the bodies were corporations aggregate with perpetual succession; "that a grant to them of real estate carried a fee without being to their successors; that in a writ of right, they can count only upon their own seisin within thirty years." *Shaw, C. J.*, in *Boston v. Sears*, 22 Pick. (Mass.) 122.

In *Michigan*, the county board of supervisors may divide a township, on application of twelve freeholders, notice, hearing, etc. *Michigan Gen. Stat.* (1882), §. 486 *et seq.*

A town treasurer, on the annexation of the territory including his residence, to a city, was held not entitled to receive from the county treasurer, moneys of the township. *Youngblood v. Stellwagen*, 33 Mich. 1.

Where a municipality is incorporated from part of a township, the latter's property rights can be altered only by express statutory provision. A burying-ground was held not affected by *Michigan Comp. L.*, § 766, which applies not to such case, but simply to township division. *Board of Health v. East Saginaw*, 45 Mich. 257.

One township cannot bind another carved therefrom, on a cause of action arising before the division; and the latter is not bound, if not a party to the judgment. *Pierson Tp. v. Reynolds Tp.*, 49 Mich. 224.

In *Minnesota*, as to the requisite procedure for severance, see *State v. Mantor*, 14 Minn. 437; *Maple Lake v. Wright County*, 12 Minn. 403. The action of the county board in dividing a town is legislative and not judicial, and is not reviewable on *certiorari*. *Christlieb v. Hennepin County*, 41 Minn. 142. An unplatted homestead, brought within a town by an enlargement act, cannot be reduced by contiguous platting by another than the claimant. *Baldwin v. Robinson*, 39 Minn. 244. But compare *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323.

For requisites of proceedings on severance, see *State v. Martin*, 14 Minn. 437.

In *Mississippi*, "to enlarge or contract the boundaries of a city, town, or village, it shall be necessary for the municipal authorities to pass an ordinance defining with certainty the territory which it is proposed to include in, or exclude from, the corporate limits, and also defining the entire boundary as changed. The ordinance shall not become operative until one month after its passage, and until it shall have been published for three weeks in some newspaper," etc. Any person interested may prosecute an appeal to the circuit court on giving an appeal bond. *Mississippi Code* (1892), § 2912. A citizen believing the limits unreasonably extended or contracted, may, within five years, on petition and bond, obtain relief, § 2916. The mayor and aldermen of the town are "to provide that any person desiring to subdivide a tract of land within the corporate limits, or to be included therein, shall

submit a plat or map of such subdivision, and a correct abstract of title of the land platted, to the mayor and board of aldermen, to be approved by them before the same shall be filed for record in the record of deeds of the county," § 2937. As to the procedure in altering or vacating a plat, see § 4404. As to legislative control, see *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661.

In *Missouri*, the county court may alter the boundary of townships and increase or diminish their number, on petition, notice and election, if the alteration be ratified by a two-thirds majority of the voters affected. *Missouri Rev. Stat.* (1889), § 8432. The *Missouri Act of 1885*—allowing annexation to a city having more than 20,000, and less than 250,000 inhabitants—has been upheld; the court, however, declaring that the power must be exercised reasonably. *Kelly v. Meeks*, 87 Mo. 398. The reasonableness of the extending ordinance is open to judicial scrutiny. *Plattsburg v. Riley*, 42 Mo. App. 18. Compare *Kansas City v. Richards*, 34 Mo. App. 521.

In the *Missouri* annexation act, "commons" means not farm lands, but lands included in, or belonging to a town, set apart for public use. *State v. McReynolds*, 61 Mo. 203.

In *Nebraska*, fractions of townships caused by the county lines not being in accordance with the surveyed townships, and not having enough inhabitants for a separate town, may be annexed by the county board to adjoining towns. *Nebraska Consol. Stat.* (1891), § 949. The county board may annex to an adjoining town a town which, through failure of its officers to qualify, cannot be organized. § 959.

In *New Hampshire*, as to legislative control, proceedings by the selectmen, etc., see *Londonderry v. Derry*, 8 N. H. 320; *Boody v. Watson*, 64 N. H. 162. Upon severance, no property of the original town belongs to the new corporation, except as expressly provided in the act of separation. *Greenville v. Mason*, 53 N. H. 515. Compare the case of municipal war expenditures, *Sanbornton v. Tilton*, 55 N. H. 603.

In *New Jersey*, where one township is created out of parts of others, and an assignment of a public road is made between them, each has the same power, *e. g.*, to remove encroachments, over the part assigned to it that is given by law over roads entirely within its territory. *State v. Van Derveer*,

47 N. J. L. 259. The legislative body must require the consent of the corporators. *Paterson v. Society*, etc., 24 N. J. L. 385.

In *New York*, on severance, the supervisors and overseers of the poor agree upon the disposition of the town lands, and the apportionment of the proceeds. Bird. *New York Rev. Stat.* (1890), p. 3075, § 4. Similarly, in case of annexation, § 5. As to the requisites of the procedure of the board, see *People v. Carpenter*, 24 N. Y. 86.

As to disposition of town property upon alteration of town boundaries, see *New York Laws* (1892), ch. 569, § 3; *Am. G. L.*, ch. 20, p. 2228.

It has been held that a village having a special charter cannot be enlarged by the county board. *People v. Mabie* (Supreme Ct.), 26 N. Y. Supp. 450.

The legislature, in abridging the terms of town officers by annexation to a city, does not thereby contravene the constitutional inhibition of abolishing or shortening a term of office. *Gertum v. Kings County*, 109 N. Y. 170.

In *New York*, a constitutional provision prohibiting any statute embodying part of an existing law, was held not to be contravened by the act of 1875, ch. 400, for setting off Wappinger, and continuing in force laws applicable to Fishkill. Nor does the provision continuing the town officers contravene the inhibition of appointment by the legislature. *People v. Hayt*, 7 Hun (N. Y.) 39.

In *North Carolina*, the general assembly may extend town limits, without the consent of the inhabitants of the addition. *Manly v. Raleigh*, 4 Jones Eq. (N. Car.) 370.

In *Ohio*, the county commissioners may, on petition, hearing, etc., make partition of civil townships, or annexation thereto. *Ohio Rev. Stat.* (1890), § 1377. Alteration of township lines does not change the liabilities of any part thereof, § 1385.

As to cessation of authority of township officers within an included city, see *State v. Ward*, 17 Ohio St. 543.

The *Ohio* Act of 1890, detaching territory from Findlay and annexing it to the original township, was held constitutional. *Metcalf v. State*, 49 Ohio St. 586.

In *Oklahoma*, as to the procedure for extension of town limits, see *Oklahoma Stat.* (1890), § 751 *et seq.*

In *Oregon*, the legislature can divide

towns and counties, and apportion the common property as it seems reasonable and equitable. *Morrow County v. Hendryx*, 14 Oregon 397.

In *Pennsylvania*, a township may be annexed to a city on petition of three-fifths of the taxables, to the city council, with certified plat, etc. From the council's action an appeal may lie to the court of quarter sessions. *Bright. Purd. Pennsylvania Dig. L.* (1885), pp. 373-4. As to the procedure and requisites in division of a township, annexation, etc., see *In re Wyalusing Tp.*, 2 S. & R. (Pa.) 402; *In re Macungie Tp.*, 3 Rawle (Pa.) 459; *In re Green Tp.*, 9 W. & S. (Pa.) 22; *In re Greenwood Tp.*, 3 Grant's Cas. (Pa.) 261; *In re Bethel Tp.*, 1 Pa. St. 97; *In re Harrison Tp.*, 5 Pa. St. 447; *In re Catharine Tp.*, 31 Pa. St. 303; *In re Alba Tp.*, 35 Pa. St. 271; *In re North Whitehall Tp.*, 47 Pa. St. 156; *In re Wetmore Tp.*, 68 Pa. St. 340; *In re Plum Tp.*, 83 Pa. St. 73; *In re Valley Tp.*, 146 Pa. St. 111; *In re Plymouth Tp.*, 5 Kulp. (Pa.) 211.

The *Pennsylvania* Act of 1889, concerning the annexation of "any borough or township," adjoining any city of the third class, is construed not to provide for annexing part of a borough. *In re Dunmore*, 154 Pa. St. 24.

The *Pennsylvania* Act of 1889 (P. L. 280) was construed to permit the annexation of a portion of a borough. *McAskie's Appeal*, 154 Pa. St. 24, following *Pittsburg's Appeal*, 79 Pa. St. 317.

Where a new township is erected from part of an old one, the legislature may empower the voters to decide by ballot whether the old one shall be continued or annulled. *Com. v. Judges*, 8 Pa. St. 391.

Legislative authority for the quarter session court to incorporate any town or village containing 300 inhabitants, on petition, etc., was held not to allow incorporating into a borough distinct villages and open country. *In re West Philadelphia*, 5 W. & S. (Pa.) 281.

The division of a town was held not to vacate the commission of a justice of the peace for the district. *Com. v. Sheriff*, 4 S. & R. (Pa.) 275.

A petition to change the name of a borough from "East Stroudsburg" to "Penn City," was refused as misleading. *In re East Stroudsburg*, 9 Co. Ct. Rep. (Pa.) 529.

In *Tennessee*, adjoining territory may be added on the petition of five freeholders thereof, election, etc. *Tennes-*

§. APPORTIONMENT OF INDEBTEDNESS.—Inequalities in the burdens of indebtedness and of taxation have sometimes constituted an objection to town annexation; especially in case of annexation of rural territory sparsely populated. It has been found difficult to formulate any general statute that would equitably reach all circumstances.¹ Where a township is divided by the

see Code (1884), § 160 *et seq.* Property owners may resort to the courts to test the validity of the election for annexation. *Morris v. Nashville*, 6 Lea (Tenn.) 337.

Alteration of the town limits can be made in chancery only upon application of the town authorities. *Mason v. London*, 8 Baxt. (Tenn.) 94.

In *Texas*, as to the half-mile restriction, see *East Dallas v. State*, 73 Tex. 371. The *Texas* act extending Marshal, did not render a country homestead a town homestead, until survey, ordinance, etc. *Taylor v. Boulware*, 17 Tex. 74; 47 Am. Dec. 642. The courts cannot review the legislature's decision upon the extent of the enlargement. *Madrey v. Cox*, 73 Tex. 538.

The wish for annexation under *Texas* Rev. Stat., art. 503, may be signified either by petition or by formal election. *Graham v. Greenville*, 67 Tex. 62.

In *Vermont*, a legislative act setting off part of one town to another, transfers only municipal jurisdiction; it affects no vested right of proprietorship—*e. g.*, under a charter reservation of lands for the use of schools. *White v. Fuller*, 38 Vt. 193. As to the effect of annexation under certain special acts of the general assembly, see *Hunter v. West Windsor*, 24 Vt. 327; *Stowe v. Luce*, 27 Vt. 605; *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748; *Wilmington v. Somerset*, 35 Vt. 232; *Collins v. Burlington*, 44 Vt. 16.

An imperfect division of a town, acquiesced in by the proprietors, was held good against a stranger. *Sawyer v. Newland*, 9 Vt. 383. As to evidence admissible upon such acquiescence, see *Hubbard v. Austin*, 11 Vt. 129.

In *Washington*, as to the procedure for enlargement, see *Washington Gen. Stat.* (1891), § 501. As to the effect of consolidation of municipalities upon corporate indebtedness, see § 502. As to the procedure for the reduction of town territory, see § 673. The consolidation act of 1890 applies to municipalities under special charter as well

as to others. *State v. New Whatcom*, 3 Wash. 7.

In *West Virginia*, as to legislative control in cases of division, see *Barker Dist. Board v. Valley Dist. Board*, 30 W. Va. 424.

For requisites of procedure in changing town boundaries, see *Davis v. Point Pleasant*, 32 W. Va. 289.

In *Wisconsin*, a town may be divided on petition of thirty resident freeholders and one-third the legal voters, to the county board, notification, election, etc. *Wisconsin* Annot. Stat. (1889), § 671. As to legislative control, see *Smith v. Sherry*, 54 Wis. 114; *Washburn v. Oshkosh*, 60 Wis. 453.

The legislature may constitutionally prescribe that the question of severance of a town be submitted to vote, on petition of two-fifths of the legal voters. *State v. Forest County*, 74 Wis. 610.

The requirements as to "division," *Wisconsin* Rev. Stat., § 671, do not apply to the vacation of a town and annexation of its territory to others. *State v. Wood County*, 61 Wis. 278.

For requisites of procedure in changing town boundaries, under *Wisconsin* Rev. Stat., § 670, see *Smith v. Sherry*, 54 Wis. 114. Further, as to annexation, see *State v. Pierce*, 35 Wis. 93.

A resident and elector of an organized village cannot vote for officers of the town from which the village was set off. *Jones v. Kolb*, 56 Wis. 263.

A town is liable for injury from a defect in a bridge in a village within the town limits, unless the village charter otherwise provides, or unless the bridge is on a village street and not on a town, county or state road. And this, though the village may have occasionally made slight repairs on the bridge. *Spearbracker v. Larrabee*, 64 Wis. 573.

1. SEE MUNICIPAL CORPORATIONS, vol. 15, p. 1013.

In *Ohio*, it is no constitutional objection to compulsory annexation that the new property so brought in must be taxed to discharge pre-existing municipal indebtedness. *Powers v. Wood County*,

8 Ohio St. 285; *Blanchard v. Bissell*, 11 Ohio St. 96. It is not to be presumed that there was not a benefit commensurate with the debt. *U. S. v. Memphis*, 97 U. S. 284. So, also, in *Virginia*, *Wade v. Richmond*, 18 Gratt. (Va.) 583. And in *Pennsylvania*, *Kelly v. Pittsburg*, 85 Pa. St. 170; 27 Am. Rep. 733; 104 U. S. 78. So, also, in *Nebraska*, *Turner v. Althaus*, 6 Neb. 54.

In *Kentucky*, it is now held otherwise. *Covington v. Southgate*, 15 B. Mon. (Ky.) 491; *Courtney v. Louisville*, 12 Bush (Ky.) 419; *Parkland v. Gaines*, 88 Ky. 562. In *Louisville Bridge Co. v. Louisville*, 81 Ky. 189, the court, by Hargis, C. J., said: "If all property is to be taxed because it is profitable to own by reason of the patronage of the city, then we can see no escape for suburban property, which, it is well known, gradually declines in value as its distance from the city's population increases. Where, then, would the supposed corresponding benefits of the city's patronage cease? To answer this question, would be the ceaseless work of litigation, fomented by unnecessary extension of municipal boundaries for the embracement of taxable subjects." Farming lands within the town limits, but without city population, cannot be taxed for municipal purposes. *Parkland v. Gaines*, 88 Ky. 562. Compare *Henderson v. Lambert*, 8 Bush (Ky.) 607.

In *Alabama*, the new corporation with different boundaries, but with substantially the same population and taxable property, was held liable for the debt of the old one. *Mobile v. Watson*, 116 U. S. 289.

In *Colorado*, as to the bonded indebtedness on consolidation, see *Colorado Sess. L.* (1893), p. 458, § 17.

In *Illinois*, the assumption of indebtedness, the tax levy, etc., on annexation, are very explicitly provided for by the act of 1889. *Illinois Rev. Stat.* (1891), p. 269b, § 210c *et seq.*

In *Indiana*, in case of the annexation of a town to a city, "the city shall be liable for all debts, contracts, and liabilities of the town, and shall be entitled to all the rights, credits, moneys, effects, and property of the town; and may sue and be sued in relation thereto in the name of the city." So, also, in case of consolidation, will the new city have the rights and liabilities of the constituent town and city. *Indiana Rev. Stat.* (1888), § 3242.

In *Kansas*, upon division of a township, the surplus money must be di-

vided "in proportion to the taxable property remaining, and that detached." *Kansas Gen. Stat.* (1889), § 7062.

As to interest in property on division, rights in a town hall, etc., see *Wellington v. Wellington Tp.*, 46 Kan. 213; *Miami County v. Wilgus*, 42 Kan. 457.

The fact that a city had become detached from a township, has been held not to relieve the city from a tax to pay bonds in aid of a railroad; and this, notwithstanding an agreement between officers of a city and the town assuming to adjust, etc. *Oswego Tp. v. Anderson*, 44 Kan. 214. It has also been held that a township cannot relieve itself of liability by detachment of territory from a city, etc. *Walnut Tp. v. Jordan*, 38 Kan. 562.

After a township had voted to issue bonds to build a bridge, a new township was formed embracing part of the territory. The bridge was built, and also a bridge in the new township; the people thereof no longer needing the bridge in the old one. A majority of the court held that a statute afterwards passed making them liable to assist in paying the bonds issued by the old township, was void. *Craft v. Lofinck*, 34 Kan. 365.

In *Louisiana*, there must be no parochial taxation without the municipality's representation on the police jury. *Felix v. Wagner*, 39 La. Ann. 391.

In *Maine*, the new town was held not to be bound by the old town's contract with another town as to support of a pauper family. *Veazie v. Howland*, 47 Me. 127.

The settlement of a person absent at the time of annexation, was held not to be affected thereby. *Manchester v. West Gardiner*, 53 Me. 523.

The procedure in apportionment and assessment, under the *Maine Act* of 1867, ch. 291, setting off part of Frankfort to Winterport, is given in *Vose v. Frankfort*, 64 Me. 229.

In order to establish the new town's proportionate liability, it need not be notified of an action brought against the old one. *Mount Desert v. Tremont*, 72 Me. 348.

In *Massachusetts*, under a statutory provision that if, upon severance, the towns do not agree in respect to the division of debts and unpaid taxes, the superior court may, on petition, appoint three commissioners, whose award, on acceptance by the court,

shall be final, and the decree thereon shall not be set aside except for fraud or manifest error, neither party can appeal therefrom. *Cottage City v. Edgartown*, 134 Mass. 67. Compare a case upon such report as to the provision in a *Massachusetts Stat.* (1881), ch. 172, § 6, "for the annual excess, if any, of maintaining the public schools." *Needham v. Wellesley*, 139 Mass. 372.

A public common reserved by the original proprietors of a town for public uses, was held not to be "corporate property," within the *Massachusetts Act of 1870*, ch. 35, providing for apportionment between Norfolk and Wrentham. Otherwise as to a school fund. *Wrentham v. Norfolk*, 114 Mass. 555. Compare *Yarmouth v. North Yarmouth*, 34 Me. 411; 56 Am. Dec. 666.

In *Michigan*, the annexation must not interfere with the boundaries of representative districts. *Att'y Gen'l v. Holihan*, 29 Mich. 116; *People v. Bradley*, 36 Mich. 447. There, corporate taxation cannot be forced upon rural territory except by express statute. *People v. Bennett*, 29 Mich. 451; 18 Am. Rep. 107. Compare *Smith v. Saginaw*, 81 Mich. 123.

After a new township had been set off, a judgment was rendered for a liability theretofore incurred for a highway defect. It was held that for the purpose of meeting it, the old corporation must be considered still to exist; and that *mandamus* lies to compel the clerk to issue a certificate for a tax levy to satisfy it. *Courtright v. Brooks Tp.*, 54 Mich. 182.

Mandamus lies to compel the payment of a debt apportioned on the division of a township. *Marathon Tp. v. Oregon*, 8 Mich. 372.

In *Minnesota*, as to the liability of the original town for conversion of taxes collected, see *Clayton v. Bennington*, 24 Minn. 14. The act allowing the district court to enlarge or diminish the boundaries of a village "as justice may require," is an unconstitutional delegation of legislative powers. *State v. Simon*, 32 Minn. 540.

The legislature may erect a new town out of part of the territory of an old one, without providing for the previous debts and liabilities. In such case, the old town remains solely responsible for such debts and liabilities. No contract right or obligation is impaired, though the old town's taxable resources are thereby largely dimin-

ished, and though such debts may have been incurred upon the faith of a statutory pledge that the town would provide a sufficient sinking fund, by taxation, to pay the same at maturity, it not appearing that its power so to do has been rendered ineffectual therefor. *State v. Lake City*, 25 Minn. 404.

In *Mississippi*, reincorporation with retention of name and powers, but with excision of population and territory, was held not to extinguish debts of the original corporation. *Ross v. Wimberly*, 60 Miss. 345.

In *Missouri*, the fact that the fee of an addition has been vested in the town, does not import the right of immediate taxation. *Cameron v. Stephenson*, 69 Mo. 372.

The charter of a *Missouri* town was forfeited for non-user, but its creditors were not made parties to the proceeding. Meanwhile it had issued bonds in aid of a railroad. It was held that a city afterwards incorporated, embracing the same population and territory, was liable on the bonds. *Hill v. Kahoka*, 35 Fed. Rep. 32.

A city formed from the reorganization of a *Missouri* town, becomes liable for the town's debt. *Laird v. De Soto*, 22 Fed. Rep. 421, citing *Broughton v. Pensacola*, 93 U. S. 226. And this, although the city contains 400 acres less than did the town. *Laird v. De Soto*, 23 Fed. Rep. 780.

In *Nebraska*, to justify annexation, it must appear that some part of the territory would receive material benefit therefrom, or that justice and equity require it. *Hartington v. Luge*, 33 Neb. 623.

Under the *New Jersey Act of 1871*, dividing Woodside between Newark and Belleville, and directing that its debts be paid by them in certain proportions, a creditor of Woodside may maintain an action against Newark and Belleville. *Neilson v. Newark*, 49 N. J. L. 246. It is for the legislature to determine the proportion of debts that belongs to the new town. *State v. Elvins*, 32 N. J. L. 362.

The *New Jersey Act of 1871*, dividing Hackensack township into Ridgefield, Englewood and Palisades, was held not *proprio vigore*, to render any single township liable for any particular debt—*e. g.*, for street grading—though contracted wholly for work entirely within its territorial limits. *Vanderbeck v. Englewood*, 39 N. J. L. 345.

line of a new county, the payment by one fraction of a debt of the old township lays the foundation of a claim for contribution.¹

c. EQUALIZATION OF TAXATION.—Whether the difficulty may be obviated by boards of equalization of assessments, depends on the statutory designation of their duties.²

In *New York*, on the division of a town, the debts are apportioned in the same manner as the town's personal property, on three days' notice by the supervisor to the other members of the town boards. *New York Laws* (1892), ch. 569, §§ 4 and 5. Each of the two towns was held to succeed to the common lands within its limits, in severalty. *North Hempstead v. Hempstead*, Hopk. (N. Y.) 288; *Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320.

In *Pennsylvania*, road taxes assessed on unseated lands, before the severance, but collected after it, are payable to the old township, though the lands fall within the new one. *Barnett Tp. v. Jefferson County*, 9 Watts. (Pa.) 166. When a township is divided by the line of a new county, each fraction remains liable for the whole of a debt due by the original township. The remedy is by an action for contribution. *Plunkett's Creek Tp. v. Crawford*, 27 Pa. St. 107. As to an apportionment of the indebtedness between a township and a borough erected therefrom, see *Jenkins v. Yatesville*, 1 Kulp. (Pa.) 190.

No large body of farm lands can be included in the corporate limits. *In re West Philadelphia*, 5 W. & S. (Pa.) 281; *In re Little Meadows*, 35 Pa. St. 335; *In re Blooming Valley*, 56 Pa. St. 66; *Devore's Appeal*, 56 Pa. St. 163. The fact that the extension would withdraw the control of certain property, forms no valid objection. *In re Edgewood*, 130 Pa. St. 348. As to legislative control, see *Smith v. McCarthy*, 56 Pa. St. 359.

As to apportionment, etc., on the organization of a new borough out of an old one having a funded debt, see *Darby's Appeal*, 140 Pa. St. 250.

In *West Virginia*, a town may so extend its limits as to include a railroad bridge across the Ohio river; and proper taxation thereof is not *ultra vires*. *Point Pleasant Br. Co. v. Point Pleasant*, 32 W. Va. 328. As to the taxation of farm lands within town limits, see *Probasco v. Moundsville*, 11 W. Va. 501.

In *Wisconsin*, on severance, the county board fixes the proportion of indebted-

ness chargeable *pro rata*, according to the last assessment rolls of the old town. *Wisconsin Annot. Stat.* (1889), § 672. If there be no provision for contribution, and the old town retains all its property and franchises, the detached town is not liable for the indebtedness. *Depere v. Bellevue*, 31 Wis. 120. *Compare Goodhue v. Beloit*, 21 Wis. 636; *Knight v. Ashland*, 61 Wis. 233.

The requirement, *Wisconsin Rev. Stat.*, § 672, that a new town formed out of part of an old one "pay" its proportion of the latter's indebtedness, imports power to sue the former therefor on refusal. *Ackley v. Vilas*, 79 Wis. 157.

In the absence of a contrary statutory provision, a village organized under *Wisconsin Rev. Stat.*, ch. 40, is not liable to the town in which it lies for any of the town's expenses of assessment, election, or meeting. *Plainfield v. Plainfield*, 67 Wis. 526.

The transfer of a town from one county into another, does not affect its liabilities. Where *Langdale*, after contracting debts, was attached to *Richmond*, and afterwards detached and created into the new town of *Langdale*, it was held that *Richmond* still remained liable for the debts. The rule that, in the absence of contrary statutory provision, the annexed town's assets and liabilities shall become those of the annexee, does not apply when the annexation is merely for a temporary purpose; *e. g.*, *Langdale's* attachment to *Polar*, until the organization of a town government by the election of officers. *Schriber v. Langdale*, 66 Wis. 616.

On the division of *Waldwick, Wisconsin*, carving out *Moscow*, each was adjudged to pay the proportion of the debt supposed to be assumed by it in aid of a railroad, although the legality of the procedure was doubtful. *Morgan v. Waldwick*, 17 Fed. Rep. 286.

1. *Plunkett's Creek Tp. v. Crawford*, 27 Pa. St. 107. See also *North Whitehall v. South Whitehall*, 3 S. & R. (Pa.) 117; *Devor v. McClintock*, 9 W. & S. (Pa.) 80; *Gibson v. Nicholson*, 2 S. & R. (Pa.) 422.

2. See *TAXATION*, vol. 25, p. 5.

In *Illinois*, as to the duties of the

town assessor, town clerk, and supervisor, as a board to review taxation of parties aggrieved, etc., see *Illinois Rev. Stat.* (1891), p. 1246; as to equalization by the county board, see p. 1249; and by the state board, p. 1252.

In *Indiana*, as to the duties of boards of equalization, see *Indiana Rev. Stat.* (1888), §§ 3157, 6399.

Where, after the vote of an appropriation to a railroad, territory was annexed, through which the road was built without touching the original township, it was held that no tax could be levied to pay the appropriation. *Alvis v. Whitney*, 43 Ind. 83.

In *Iowa*, as to such township board, see *McClain's Iowa Code* (1888), §§ 532, 1309; county board, § 1313; state board, § 1315 *et seq.* See also *O'Hare v. Dubuque*, 22 Iowa 144; *Deeds v. Sanborn*, 26 Iowa 419; *Deiman v. Fort Madison*, 30 Iowa 542; *Hayzlett v. Mount Vernon*, 33 Iowa 229; *Durant v. Kauffman*, 34 Iowa 194; *Sears v. Iowa Midland R. Co.*, 39 Iowa 417; *Brooks v. Polk County*, 52 Iowa 460; *Evans v. Council Bluffs*, 65 Iowa 238; *Tubbesing v. Burlington*, 68 Iowa 691.

There, also, an objection that inequality would result from the fact that the annexed lands were subject to overflow, was held to be invalid. *Ford v. North Des Moines*, 80 Iowa 626.

As to liability of unplatted lands in cities and towns, see *Perkins v. Burlington*, 77 Iowa 553.

Where two townships included within a city, comprise but one assessorial district, the county board of equalization cannot equalize taxation as between them, but can act only on the whole district. *Getchell v. Polk County*, 51 Iowa 107.

In *Kansas*, it was held that it is not the duty of the officers of a new township to levy any of the taxes to pay bonds and interest voted by the old township, for the construction of a bridge, before the new one is detached and organized. *Fender v. Neosho Falls Tp.*, 22 Kan. 305.

In *Michigan*, as to the duty of the supervisors as a "board of equalizers," see *Michigan Gen. Stat.* (1882), § 325.

The old township may levy and collect taxes until the one carved therefrom is completely organized by the election of officers. *Comins v. Harrisville*, 45 Mich. 442.

Under *Michigan* Sess. L. (1861), p. 293, providing that local taxes levied in an unorganized county, attached to

an unorganized township, must be expended within the limits of the unorganized territory, a township created out of such territory cannot maintain an action against the township to which it was formerly attached, for the amount of local taxes not expended according to the statute. *Midland Tp. v. Roscommon Tp.*, 39 Mich. 424.

In *Minnesota*, the county board of equalization "shall, upon complaint of any party aggrieved, being a non-resident of the town or district in which his property is assessed, reduce the valuation of each class of personal property. . . . They may raise the aggregate valuation of such real property," etc. *Minnesota Gen. Stat.* (1891), § 1465. As to the duties of the town board of equalization, see §§ 1463-4.

A reincorporated village was held to remain liable for its proportion of the general township indebtedness previously incurred, and of certain general town charges for township purposes, not inconsistent with the general statute. *Bradish v. Lucken*, 38 Minn. 186.

In *Mississippi*, as to the power of the board of supervisors to order a new assessment amending, etc., see *Mississippi Code* (1892), § 3785.

In *Missouri*, as to the duties of the county board of equalization, see *Missouri Rev. Stat.* (1889), § 8520.

In *Nebraska*, the governor, auditor, and treasurer constitute the state board of equalization. *Nebraska Consol. Stat.* 1891, § 3973. As to the duties of the town, the city, and the county boards thereof, see § 3968 *et seq.* There the county board of equalization, in a county under the supervisor system, cannot reduce or increase the valuation of an individual assessment, unless application has been made to the township board and been rejected. *McGee v. North American Cattle Co.*, 32 Neb. 149, *distinguishing* *State v. Dodge County*, 20 Neb. 595.

In *New York*, as to taxation, see the case of a city's purchase of lands in a town, for a reservoir, etc. *Rochester v. Rush*, 80 N. Y. 302.

In *Hewitt's Appeal*, 88 Pa. St. 55, a majority of the court held that the *Pennsylvania* Act of 1871, allowing North End to be annexed to Allegheny upon a two-thirds vote, was constitutional, and that municipal taxes might be imposed on lands which, from their rural characters, could receive no appreciable benefit.

In *Rhode Island*, as to an appeal

3. Districts; Reservations—*a.* **SCHOOL-LAND SECTIONS; MINISTRY LOTS.**—The general government has made provision for the appropriation of the sixteenth and the thirty-sixth township sections, or an equivalent thereof, to the maintenance of schools.¹ Specific grants have been made in territorial organic acts, and accepted in state constitutions.²

from the board of relief on an extension of municipal limits, see *Valcourt v. Providence* (R. I. 1893), 26 Atl. Rep. 45.

For the construction and effect of the *Tennessee* Act of 1879, providing for taxing districts for communities whose charter has been abolished, see *Luehrman v. Shelby County Taxing Dist.*, 2 Lea (Tenn.) 425.

1. U. S. Rev. Stat. (1878), § 2275.

2. As to the utilization of such grant:

In *Alabama*, see *Alabama* Code, (1886), § 1023.

In *Arkansas*, see *Arkansas* Dig. Stat. (1884), p. 151.

In *California*, see *California* Pol. Code (1885), §§ 3442, 3494.

As to the prospective effect of the acts of Congress thereon, upon the vesting of such township section when she is admitted as a state, see *Doll v. Meador*, 16 Cal. 295; *Ward v. Mulford*, 32 Cal. 365. There was no vesting until selection, etc. *Megerle v. Ashe*, 27 Cal. 322; 87 Am. Dec. 76.

In *Colorado*, such township section can be sold only at the discretion of the state board; and this, only at public auction, and at not less than \$3.50 per acre. *Colorado* Annot. Stat. (1891), § 3638.

In *North Dakota*, "the board of university and school lands" "shall have control of the appraisal, sale, rental, and disposal of all school and university lands. . . . No land shall be sold for less than the appraised value, and in no case for less than \$10 per acre." *North Dakota* Const. (1889), §§ 156, 158. As to the procedure in appraisal, equalization, and leasing, see *North Dakota* Sess. Laws (1891), p. 165 *et seq.*

In *South Dakota*, as to the same, see *South Dakota* Const., art. 8, § 5; and *South Dakota* Sess. Laws (1890), p. 296 *et seq.*

In *Indiana*, if such section of the congressional township be divided by a county or civil township line, the voters designate a trustee to be the custodian thereof, and receive the revenue thereof from the county treasurer. *Indiana* Rev. Stat. (1888), § 4330.

In *Iowa*, see *McClain's Iowa* Code (1888), § 3001.

In *Kansas*, see the constitution of 1859, *Kansas* Gen. Stat. (1889), § 74, and *State v. Stringfellow*, 2 Kan. 263.

In *Maine*, as to the effect of the division of the town upon the public school lands, see *Poland v. Strout*, 19 Me. 121. As to what passes by a deed of ministerial and school lands in a town, by the municipal officers, see *Abbott v. Chase*, 75 Mo. 83; *Bucksport v. Spofford*, 12 Me. 487.

In *Massachusetts*, as to a town's rights over lands given it for school purposes, or for the use of the ministry, see *First Parish v. Dunning*, 7 Mass. 445; *Worcester v. Eaton*, 13 Mass. 371; 7 Am. Dec. 155; *Harrison v. Bridgeton*, 16 Mass. 16; *Humphrey v. Whitney*, 3 Pick. (Mass.) 158; *Congregational Soc. v. Curtis*, 22 Pick. (Mass.) 320; *Essex v. Low*, 5 Allen (Mass.) 595.

In *Michigan*, the minimum price of unimproved university lands is \$12 per acre; of school lands \$4 per acre. *Michigan* Annot. Stat. (1882), § 5262.

In *Minnesota*, as to the school-land sections, see *Minnesota* Stat. (1891), § 3614 *et seq.*; Act of Congress of 1851, 9 U. S. Stat. at L., p. 568, § 1.

In *Mississippi*, see *Mississippi* Code (1892), § 4144 *et seq.*

In *Missouri*, see *Missouri* Rev. Stat. (1889), § 8052.

In *Montana*, the school lands are under the management of a state-land agent, appointed by the governor and the state board of land commissioners. *Montana* Sess. L. (1891), p. 177.

In *Nebraska*, see *Nebraska* Const. (1875), art. 8, § 3; also *Nebraska* Consol. Stat. (1891), § 3829.

In *Nevada*, see *Nevada* Gen. Stat. (1885), §§ 33-5.

In *New Hampshire*, as to regulations of grants for the support of the gospel ministry in towns, see *New Hampshire* Pub. Stat. (1891), p. 420.

In *Ohio*, see *Ohio* Rev. Stat. (1890), §§ 1404, 1418.

In *Oregon*, see the Act of Congress of 1851, 9 U. S. Stat. at L., p. 568, § 1.

In *Texas*, the case of the school

b. SCHOOL DISTRICTS.—The division of township territory into school districts, as also the corporate powers thereof, are very similar in the *New England* states, but various in the other states.¹

lands is vested in the commissioners of the general land office, with the aid of the attorney-general. *Texas Rev. Civ. Stat.* (1889), art. 4039.

In *Utah*, see the organic Act of Congress of 1850, 9 U. S. Stat. at L., p. 457, § 15.

In *Vermont*, "the selectmen shall have the care of the lands in their towns granted as glebes for the use of the church of *England*, and now by law granted to such towns for the use of schools, and lands granted to the use of the ministry or the social worship of God, and lands granted to the first settled minister, and not appropriated according to law; they may lease such lands as they judge beneficial." *Vermont Rev. L.* (1880), § 2703. They can give no title except by lease. Upon an attempt to convey absolutely, equity will relieve by modifying the form of the contract. *Lampson v. New Haven*, 2 Vt. 14. As to the selectmen's distribution of the rents of ministry lands, see *First Universalist Soc. v. Leach*, 35 Vt. 108; *Victory v. Wells*, 39 Vt. 488.

In *Wisconsin*, see the Act of Congress of 1846, 9 U. S. Stat. at L., p. 58, § 7.

In *Wyoming*, the governor, the superintendent of public instruction, and the secretary of state, constitute a board of land commissioners for the management of the state lands, including those transferred from the *United States* by the State Admission Act of 1890. *Wyoming Sess. L.* (1891), ch. 79.

1. In *Alabama*, each incorporated town of 3,000 inhabitants constitutes a separate school district, and, as such, may hold real and personal property, etc. *Alabama Code* (1886), § 999.

In *Arkansas*, "no new school district shall be formed having less than thirty-five persons within the territory included in such new district, of scholastic age." *Arkansas Dig. Stat.* (1884), § 6174.

School districts, though *quasi* corporations, are not liable for trespasses committed by their officers. *School Dist. No. 11 v. Williams*, 38 Ark. 454.

In *California*, ordinarily, each town forms one school district. *California Pol. Code* (1885), § 1576. So, also, in

Nevada. *Nevada Gen. Stat.* (1885), § 1345.

In *Connecticut*, "each town shall have power to form, unite, alter, and dissolve school districts and parts of school districts within its limits; and any two or more towns may form school districts of adjoining portions of their respective towns; but no new district shall be so formed that it shall contain less than forty persons between four and sixteen years of age." *Connecticut Gen. Stat.* (1888), § 2153.

In the *Dakotas*, there are two systems, namely, the township system and the school-district system. The statutory provisions thereon are very involved. See note under § 1845 of *Dakota Comp. Laws* (1887).

In *Delaware*, the limits of school districts must be recorded in the office of the county clerk. *Delaware Laws* (1874), p. 200. As to formation of "united school districts," see p. 205, § 8.

In *Georgia*, the county board lays off the county into school sub-districts. *Georgia Code* (1882), § 1257.

In *Illinois*, as to "school townships" and fractional township consolidation, see *Illinois Rev. Stat.* (1891), p. 1365, §§ 30, 31.

In *Indiana*, "the township trustees and the school trustees of incorporated towns and cities . . . establish and locate conveniently, a sufficient number of schools for the white children therein." *Indiana Rev. Stat.* (1888), § 4444.

In *Iowa*, as to district townships and independent school districts, see *McClain's Iowa Stat.* (1888), § 2819.

Where, after organizing sub-districts into independent districts, and instituting an action at law against the debtor districts in the apportionment of assets and liabilities, the directors went out of office, it was held that the creditor districts could in equity compel an accounting and payment. *Georgia Ind. School Dist. v. Victory Ind. School Dist.*, 41 Iowa 321.

In *Kentucky*, on report of the county superintendent, the county judge appoints a discreet citizen, who, with the county surveyor, reforms the school district in any town. *Kentucky Gen. Stat.* (1887), p. 1162.

In *Maine*, "two or more adjoining towns may concur in establishing school districts from parts of each when convenient, in determining their limits, and in altering and discontinuing them." *Maine Rev. Stat.* (1883), p. 195.

In *Massachusetts*, "a town in which the school-district system exists may abolish the same by vote. No town which has so abolished said system shall thereafter re-establish school districts." *Massachusetts Pub. Stat.* (1882), p. 306.

In *Michigan*, the township board of school inspectors divide the township into school districts as necessary from time to time. *Michigan Annot. Stat.* (1882), § 5033.

In *Minnesota*, as to the adoption of the independent school-district system by any town or village, see *Minnesota Stat.* (1891), § 3327.

In the *Minnesota* law, as to presumption of organization of a school district after one year's exercise of its franchise, "organized" relates to its formation, and not merely to its election of school officers. *State v. School Dist. No. 152* (Minn. 1893), 55 N. W. Rep. 1122.

In *Missouri*, as to the organization of school districts, see *Missouri Rev. Stat.* (1889), § 7970 *et seq.*

In *Montana*, as to school-district boundaries, formation, etc., see *Montana Comp. Stat.* (1887), § 1178.

In *New Hampshire*, a town constitutes one school district, except as to districts organized under special legislative acts. *New Hampshire Pub. Stat.* (1891), p. 251, § 1. These, however, may be dissolved by vote, and unite with the town district, p. 253, § 14.

In *New York*, the districting is the duty of the school committee. *New York Rev. Stat.* (1890), p. 553, § 74. As to the procedure for apportionment of the school fund, on the erection of a new district, see *People v. Board of Auditors*, 126 N. Y. 528.

In *Ohio*, as to the control of districting, by the township board of education, see *Ohio Rev. Stat.* (1890), § 3921.

In *Pennsylvania*, every township, borough, and city is a school district; and a city or borough may be divided into wards for school purposes. *Bright. Purd. Pennsylvania Dig. L.*, p. 282.

A school district has been held not to be liable for personal injuries to a pupil caused by the negligence of a contractor employed to repair the schoolhouse. *School Dist. v. Fuess*, 98 Pa. St. 600; 42 Am. Rep. 627.

As to the ratio to be adopted upon a division of property between school districts, see *Darby v. Sharon Hill*, 2 Pa. Dist. Rep. 485.

In *Rhode Island*, "any town may be divided, by a vote thereof, into school districts;" and "every town shall establish and maintain, with or without forming districts, a sufficient number of public schools at convenient places." *Rhode Island Pub. Stat.* (1882), p. 138.

The provision of *Rhode Island* Sess. L. 1884, ch. 447, allowing the abolition of school districts by vote at "town meeting," does not extend to authorize such abolition by vote in a voting district meeting. *Comstock v. Lincoln School Com'rs* (R. I. 1892), 24 Atl. Rep. 145.

In *Texas*, a town or village having 200 inhabitants may be incorporated simply for free-school purposes. *Texas Rev. Civ. Stat.*, art. 541, a. As to the jurisdiction of the town council, see art. 3783.

The *Texas* Act of 1891, as to incorporation for school purposes, of territory not over four miles square, was held not to require the town or village to be near the center. *State v. Allegree*, 3 Tex. Civ. App. 437.

In *Virginia*, each school district is a body corporate, and may sue and be sued, contract, hold property, etc. "The districts shall correspond in boundaries with the magisterial districts, except that towns of more than 500 inhabitants shall, if the common council so elect, constitute a separate school district." *Virginia Code* (1887), §§ 1468-9.

In *Washington*, a school district means the territory under the jurisdiction of a single board of directors. New districts may be formed on petition to the county superintendent, notice, hearing, etc. *Washington Gen. Stat.* (1891), §§ 784-5.

In *Wisconsin*, as to the formation of new school districts, see *Wisconsin Annot. Stat.* (1889), § 531.

A taxpayer of a school district may maintain a bill in equity to set aside a judgment obtained against it through fraudulent collusion of its officers with an unjust claimant. *Nevil v. Clifford*, 55 Wis. 161.

In *Wyoming*, school districts are formed by the county superintendent of schools, upon notice of district meeting, etc. A majority dissatisfied may appeal to the board of county commissioners, and thence to the superintendent.

c. ROAD DISTRICTS.—In matters other than educational, the word "district" is occasionally used interchangeably with "precinct" or "plantation."¹ Sometimes a village is a single district for various purposes, including that of keeping the highways and bridges therein in repair.² In some states, the highway districting and the appointment of "overseer" or "surveyor" are made by the town meeting; in others, by the town council, or the selectmen. But in those states where the county is the principal political unit, the highway precincts are not always allotted with regard to town lines.³

ent of public instruction. *Wyoming* Rev. Stat. (1887), § 3918 *et seq.*

1 In *Massachusetts*, the inhabitants of district "plantations" have all the powers and privileges of towns, except the right of electing a representative. Justice's Opinion, 3 Mass. 568.

In *Tennessee*, as to "taxing districts," see *Tennessee Code* (1884), § 1677.

2. In *New York*, as to the apportionment of responsibility therefor between the village trustees and the town, see Bird. *New York Rev. Stat.* (1890), p. 3266, § 45, pl. 25; p. 3295, § 166.

3. As to the territories, the act of Congress of 1886, regulating territorial legislation, inhibits laws laying out roads, etc. 24 U. S. Stat. at L., p. 170, § 1, pl. 3.

In *Alabama*, "For the purpose of keeping roads in repair, the court of county commissioners, at its first term in every second year, must divide the county into a convenient number of road precincts, and must, at the same court, appoint three apportioners for each election precinct, which apportioners shall forthwith proceed to appoint an overseer to each road precinct." *Alabama Code* (1886), § 1398.

In *Connecticut*, the highway districts are established by the town. *Connecticut Gen. Stat.* (1888), § 2678.

In *Maine*, "When the municipal officers are appointed surveyors of highways by a town, they may in writing delegate their power, or part of it, to others. They shall annually, before the tenth day of May, make a written assignment of his division and limits to each surveyor of highways, to be observed by him." *Maine Rev. Stat.* (1883), p. 253, § 58. As to the duty of the selectmen on the last surveyor's return of a highway tax as unpaid, see Tufts v. Lexington, 72 Me. 516.

In *Massachusetts*, "The selectmen of every town having more than one sur-

veyor of highways, shall annually, before the first day of May, assign in writing to each surveyor the limits and divisions of the highways and townways to be kept in repair by him." *Massachusetts Pub. Stat.* (1882), p. 347, § 4. Where no such assignment is made, the surveyors may act by a majority of the whole board. *McCormick v. Boston*, 120 Mass. 499.

In *New Hampshire*, "When the highway taxes are payable in labor, the selectmen, on or before the last Saturday in May in each year, shall limit the several surveyors' districts, and give to each surveyor a list of the persons in his district, with the highway tax against each person, and a warrant to collect the same." *New Hampshire Pub. Stat.* (1891), p. 219, § 9. The surveyor cannot arrest the body to enforce collection. *Marshall v. Wadsworth*, 64 N. H. 386.

In *New Jersey*, the township committee assigns the overseers to their several "divisions of the highways." *New Jersey Revision* (1877), p. 1002, § 37.

In *Iowa*, township trustees cannot make the improvement of the highways in one district a charge upon the other districts of the township. *Cass County Bank v. Conrad*, 81 Iowa 482.

In *New York*, the electors of a highway district may, on vote, etc., purchase fire apparatus. *New York Sess. L.* (1891), p. 477. Village trustees have not an absolute ministerial duty to erect sidewalks in streets little used; their powers are discretionary. *Cole v. Medina*, 27 Barb. (N. Y.) 218.

In *North Carolina*, the township board of supervisors annually divide the roads into sections, and appoint overseers. *North Carolina Code* (1883), § 1016.

In *Pennsylvania*, as to highways on township lines, see Bright. *Furd. Pennsylvania Dig. L.* (1885), p. 1503.

In *Ohio*, the civil township trustees

d. VILLAGE DISTRICTS.—The statutes are not uniform in their definition of village. In some states, municipalities are classified without such title. In others, the word is used in a generic sense, as designating a hamlet or collection of houses. In still others, these are distinguished from "incorporated villages."¹

divide the township into road districts. *Ohio Rev. Stat.* (1890), § 1457.

In *Rhode Island*, the town council assigns the surveyors to road districts. *Rhode Island Pub. Stat.* (1882), p. 170, § 2.

In *Vermont*, "The selectmen shall divide the town into a number of highway districts, convenient for repairing highways." *Vermont Rev. Laws* (1880), § 3051. And unless the town elects street commissioners, each district has a surveyor, appointed by the town at the annual meeting. § 2658.

In *Wisconsin*, the town board divides the town into road districts. *Wisconsin Annot. Stat.* (1889), § 1223, pl. 4.

1. In *Arkansas*, municipalities are cities of the first and second classes, and incorporated towns. *Arkansas Dig. Stat.* (1882), § 722.

In *Colorado*, so, also. *Colorado Annot. Stat.* (1891), § 4482. As to the organization of villages, see § 4516.

The *Connecticut* statutes recognize "towns, cities, and boroughs, and the village of Weathersfield." *Connecticut Gen. Stat.*, § 14.

In *Georgia*, villages are incorporated like towns. *Georgia Code* (1882), § 774.

In *Illinois*, villages may be incorporated on election, etc., the ballots being "for" or "against village organization under the general law." *Illinois Rev. Stat.* (1891), p. 260, § 179.

As to what is a "village" in a requirement of cattle-guards, see *Toledo, etc., R. Co. v. Spangler*, 71 Ill. 568.

In *Indiana*, the inhibition of horse-racing and shooting at a mark within any town, applies also to villages. *Indiana Rev. Stat.* (1888), § 2160.

In *Iowa*, the name of a village may be changed by the same procedure as in case of a town. *McClain's Iowa Stat.* (1888), § 2160.

In *Maine*, as to meetings of village corporations, see *Maine Rev. Stat.* (1883), p. 78, § 9.

In *Massachusetts*, a town meeting may authorize a village or district of 1000 inhabitants to organize to maintain street lamps, libraries, sidewalks, or police. *Massachusetts Pub. Stat.* (1882), p. 230, § 27.

In *Michigan*, as to the powers and duties of villages incorporated under the general law, see *Michigan Annot. Stat.* (1882), § 2768 *et seq.* The officers of such village are a president, six trustees, a clerk, a treasurer, a street commissioner, an assessor, a constable, and a council consisting of the president and trustees, § 2776. As to the procedure for incorporation of a village by the county board, see § 2983 *et seq.*; its officers, § 2999; the powers and duties of its president and trustees, § 3008; the powers of its marshal, § 3025. Neither the state nor any person can question the regularity of a village incorporation once generally acquiesced in. *Bird v. Perkins*, 33 Mich. 28.

In *Minnesota*, as to the procedure for incorporation of villages, see *Minnesota Stat.* (1891), § 1183 *et seq.* The village officers are a president, three trustees, a treasurer, a recorder, two justices of the peace, two constables, a marshal, and a street commissioner, § 1200. The president, trustees and recorder constitute the council. As to its powers and duties, see the twenty-nine specifications in § 1208. As to the construction and constitutionality of the village incorporation act in provision for "improvement bonds," see *McCormick v. West Duluth*, 47 Minn. 272.

In *Mississippi*, municipalities are in three classes: cities, towns, and villages. Those having less than 500 and not less than 100 inhabitants are villages. *Mississippi Annot. Code* (1892), § 2911.

In *Montana*, as to the platting of villages, see *Montana Comp. Stat.* (1887), § 2031 *et seq.*

In *Nebraska*, as to the incorporation of villages, see *Nebraska Consol. Stat.* (1891), § 2877 *et seq.*

In *New Hampshire*, "Upon petition of ten or more legal voters, inhabitants of any village situate in one or more towns, the selectmen of such town or towns shall fix, by suitable boundaries, a district including the village and such adjacent parts of the town or towns as may seem to them convenient, for any or either of the following purposes:

e. ELECTION DISTRICTS.—In *New England*, ordinarily a town constitutes a single election district. In some other states the governing board divides the town into election precincts.¹

f. FIRE LIMITS.—In many states it has been held that under general charter power to provide for the safety of the inhabitants and property, a town or other municipality may establish fire limits, and prohibit erection of wooden buildings therein. In a few states, express statutory authorization is required therefor. The adjudications construing ordinances as to erection and

The extinguishment of fires, the lighting or sprinkling of streets, the planting and caring for shade and ornamental trees, the supply of water for domestic and fire purposes, the construction and maintenance of sidewalks and main drains or common sewers, and the appointing and employing of watchmen and police officers. They shall cause a record of the petition and their doings thereon to be recorded in the records of the towns in which the district is situate." Thereupon a regular town meeting is warned, to establish and name the village district, and appoint its officers to serve until its regular annual meeting. The district may increase its powers from time to time. It may, by a two-thirds vote, terminate its existence and dispose of its corporate property. *New Hampshire Pub. Stat.* (1891), p. 174 *et seq.*

A village precinct authorized by the act of 1849, must include the whole village. *Osgood v. Clark*, 26 N. H. 307.

In *New York*, localities outside, etc., of a certain area and having less than 300 residents, may be incorporated into a village. *New York Sess. L.* (1891), p. 284. A town may establish lighting districts outside of any village therein. *New York Sess. L.* (1892), p. 513.

In *Ohio*, as to the general corporate powers of villages or hamlets, see *Ohio Rev. Stat.* (1890), §§ 1549, 1552-3. Procedure for advancing to a city of the second class, § 1582. Sanitary and police powers, § 1692 *et seq.* Right of a village containing a college to ordain against liquor-selling, § 1692 *b.* In an indictment, "village" and "borough" were held to be duplicate or cumulative names of the same thing. *Brown v. State*, 18 Ohio St. 496.

In *Oklahoma*, the name of a village may be changed on petition of two-thirds of the electors to the county board. *Oklahoma Stat.* (1890), § 757.

In *Vermont*, as to the procedure for incorporation of villages, see *Vermont*

Rev. L. (1881), § 2777 *et seq.* A description is sufficient if it enables a surveyor to ascertain the lines and corners with certainty. *Williams v. Willard*, 23 Vt. 369.

In *Wisconsin*, as to the incorporation of new villages, see *Wisconsin Annot. Stat.* (1889), § 854.

1. See *infra*, this title, *Meetings*.

In *Michigan*, the township board may divide the township into election districts. *Michigan Gen. Stat.* (1882), § 124. So, also, the village board, a village, § 132.

In *Minnesota*, each organized town constitutes one election district. *Minnesota Stat.* (1891), § 1083. The general village law of 1885 does not constitute a village an election district separate from its town. *Stemper v. Higgins*, 38 Minn. 222.

In *Ohio*, each civil township is an election precinct, unless divided by a municipal corporation having its own election precincts. *Ohio Rev. Stat.* (1890), § 1388. The county commissioners, on petition, hearing, etc., erect the election precincts. § 1389.

In *New York*, in each town of 500 electors, the supervisors and town clerk form themselves a board to divide the town into election districts. *Bird. New York Rev. Stat.* (1890), p. 929, § 30.

In *Texas*, failure of the county commissioners to recognize a ward as an election precinct, does not invalidate an election held in the precincts as established. *Davis v. State*, 75 Tex. 420.

The *Utah* organic act of Congress of 1850 requires the governor and legislative council to lay off "the necessary districts," for all officers. *Utah Comp. L.* (1888), p. 44, § 7.

In *Wisconsin*, the town board divides the town into election districts. *Wisconsin Annot. Stat.* (1889), § 27.

In *Wyoming*, the county commissioners form the election precincts. *Wyoming Rev. Stat.* (1887), § 1096.

removal of buildings, and also the decisions concerning the remedies of property owners, are not entirely uniform.¹

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1170.

In *Alabama*, such an ordinance must be construed most strongly against the municipality. Thus, one prohibiting building within the fire limits any "structure of wood," or repairing "with wood or other combustible material," etc., was held not to apply to annexing to a brick depot an addition consisting of a wooden frame standing on brick pillars, and covered with corrugated iron. *Montgomery v. Louisville, etc., R. Co.*, 84 Ala. 127. Compare the case of construing against a corporation, its charter allowing transportation, etc., of dead animals, and in favor of a municipal inhibition thereof. *Northwestern Fertilizing Co v. Hyde Park*, 97 U. S. 659. Also in what cases equity will enjoin a municipality from revoking a franchise to obstruct with sidings, etc. *Mobile v. Louisville, etc., R. Co.*, 84 Ala. 115; *Forcheimer v. Mobile*, 84 Ala. 126.

In *Arkansas*, the general police power under a municipal charter includes the establishment of fire limits. *McKibbin v. Fort Smith*, 35 Ark. 352.

The *California* constitution is not contravened by a municipal ordinance establishing fire limits. *Ex p. Fiske*, 72 Cal. 125. In the absence of such an ordinance, an adjoining house-owner cannot have enjoined the continuance of a wooden building. *McCloskey v. Kreling*, 76 Cal. 511.

In *Colorado*, the town board may direct the removal of any building within the fire limits that has become "damaged by fire, decay or otherwise, to the extent of fifty per cent. of the value," and may prescribe the manner of ascertaining such damage. *Colorado Annot. Stat.* (1891), § 4403, p. 32.

In *Connecticut*, a statute prohibiting erection, within certain municipal limits, of wooden buildings or additions having "in them" a chimney, etc., was held to be violated by a wooden addition having a chimney outside opening into it. *Daggett v. State*, 4 Conn. 60; 10 Am. Dec. 100. Within such statute, conversion of an old meeting-house into a human dwelling is not an "erection." *Booth v. State*, 4 Conn. 65. The fact that there was brick and mortar four inches thick around a wooden frame, does not take

the case out of the prohibition. *Tuttle v. State*, 4 Conn. 68. Removal and repairing of a building is not an "erection" within the prohibition. *Brown v. Hunn*, 27 Conn. 332; 71 Am. Dec. 71. A statute allowing such municipal prohibition only by license, was held to import the right to charge a reasonable license fee. *Welch v. Hotchkiss*, 39 Conn. 140; 12 Am. Rep. 383. The fact that by the owner's unlawful act, the building has become real estate, affords no ground for equity's enjoining an enforcement of the fire ordinance. *Hine v. New Haven*, 40 Conn. 478.

In the *Dakotas*, the town trustees may establish such "measures of prudence for the prevention or extinguishment of fires as they shall deem proper." *Dakota Comp. L.* (1887), § 1043, pl. 3.

In *Georgia*, the right of town authorities, "analogous to the right of eminent domain," to destroy a building to stop a conflagration, is declared by statute. *Georgia Code* (1882), § 2226. Removal of a building from the fire limits was enjoined, conditional on its not being used as a blacksmith shop, or to run a forge. *Dupree v. Brunswick*, 82 Ga. 727. Under a charter giving the mayor and council of Dalton power to abate nuisances, and to pass all ordinances they "deem necessary for preserving the health, peace, good order, and good government," etc., it was held that they could prohibit the erection of a frame building within certain limits, and cause the marshal to remove it at the owner's expense. *Ford v. Thrallkill*, 84 Ga. 169.

In *Illinois*, an ordinance prohibiting the erection of wooden buildings within the fire limits, and the marshal's tearing off a wooden roof, were held to be a proper exercise of the police power. *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89. But the owner should be first directed to do the tearing away. *Louisville v. Webster*, 108 Ill. 414.

In *Indiana*, the marshal's tearing down a wooden building within the fire limits is not a forfeiture of property in the constitutional sense. *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830.

In *Iowa*, incorporated towns may, on the petition of the owner of two-thirds

of the grounds in any square or block, prohibit the erection thereon of any building, or addition thereto, not made of brick and mortar, or of iron, stone, etc. McClain's *Iowa Code* (1818), § 616. This does not import a prohibition of lumber or wood yards therein. *Des Moines v. Gilchrist*, 67 *Iowa* 210.

In *Kansas*, where a township has voted a fire tax, "It shall be the duty of the township trustee to make a map of his township, and to subdivide his township into suitable and convenient fire districts, and to make the roads within his township conform to the fire districts." His lines must not cross a railroad track, nor come nearer than 200 feet thereof; "this, with a view of securing such fire and road districts, and such township, from incursions of prairie fires." *Kansas Gen. Stat.* (1889), § 3130. As to the remedy of a party aggrieved from a fire set to a prairie, see *Jarrett v. Apple*, 31 *Kan.* 693.

In *Kentucky*, as to the municipal power to regulate citizens' property, see *Louisville City R. Co. v. Louisville*, 8 *Bush (Ky.)* 417.

In *Louisiana*, the power to forbid the erection of combustible buildings in densely built-up parts of a town, does not depend on a legislative grant. *Monroe v. Hoffman*, 29 *La. Ann.* 651. Charter authorization to prevent reconstruction in wood, of old buildings within certain limits, was held not to import power to prevent the repairing, with wooden shingles, of roofs originally covered with such shingles. *State v. Schuchardt*, 42 *La. Ann.* 49.

In *Maine*, charter authorization to pass ordinances "needful to the good order of the body politic," imports power to prohibit the erection of wooden buildings within certain limits. *Wadleigh v. Gilman*, 12 *Me.* 403; 28 *Am. Dec.* 188.

In *Massachusetts*, as to the organization of fire departmental districts, on petition to the town meeting, see *Massachusetts Stat.* (1882), p. 269. Cities and towns may, by ordinance, "regulate the inspection, material, construction, alteration, and use of buildings and other structures" except federal or state, etc., p. 560, § 1. The Salem ordinance prohibiting the erection of a wooden building within eight feet of another wooden one, applies to such erection, although the contract was made and work begun on the cellar, before the ordinance was enacted. *Salem v.*

Maynes, 123 *Mass.* 372. As to the power of town fire-wards to pull down buildings, etc., see *Coffin v. Nantucket*, 5 *Cush. (Mass.)* 269.

Massachusetts Stat. (1868), ch. 346, providing for the dissolution of fire districts formed of portions of more than one town, and for the division of property, was held constitutional. *Weymouth, etc., Fire Dist. v. Norfolk County*, 108 *Mass.* 142.

In *Michigan*, the council of a village of 2000 people may ordain limits "within which wooden buildings and structures shall not be erected, placed, or enlarged." *Michigan Annot. Stat.* (1882), § 2964. The prohibition does not render the erection a nuisance, without adequate remedy at law. *St. Johns v. McFarlan*, 33 *Mich.* 72. Nor does such an ordinance render the municipality an insurer of a building erected contrary thereto. *Hines v. Charlotte*, 72 *Mich.* 278. As to the effect of a refusal of the consent of the council to repair, which consent is required by the Detroit ordinance, see *Brady v. Northwestern Ins. Co.*, 11 *Mich.* 425. The Grand Rapids ordinance thereon was held to operate a repeal of a landlord's covenant to rebuild in case the tenement be burned. *Cordes v. Miller*, 39 *Mich.* 581; 33 *Am. Rep.* 430.

In *Minnesota*, municipal establishment of fire limits is provided for by *Minnesota Stat.* (1891), § 1316. See also the eight classes of buildings, etc., § 3821 *et seq.*

In *Mississippi*, such provision is made by *Mississippi Annot. Code* (1892), § 2967. Charter authorization of a town council to provide for the prevention of fires, and to carry out the mayor's recommendation tending to security, etc., imports the right to establish fire limits. *Alexander v. Greenville*, 54 *Miss.* 659. Also the right to require sidewalks within the fire limits to be paved with bricks. *Macon v. Patty*, 57 *Miss.* 378; 34 *Am. Rep.* 351.

In *Missouri*, as to municipal liability for the dangerous condition of the walls of a house partially destroyed by fire, see *Grogan v. Broadway Foundry Co.*, 87 *Mo.* 321.

An ordinance inhibiting the erection of wooden buildings in a district, was held valid. *Eichenlaub v. St. Joseph*, 113 *Mo.* 395. But see *Allison v. Richmond*, 51 *Mo. App.* 133.

In *Montana*, as to the duties of fire

wardens, see *Montana Stat.* (1887), p. 963.

In *Nebraska*, municipalities may "prescribe limits within which no building shall be constructed except of brick, stone or other incombustible material, with fireproof roof." *Nebraska Consol. Stat.* (1891), § 2664, pl. 37. A wooden building may be removed conformably with the ordinance, from one site to another within the fire limits, for the purpose of erecting on the old site a building. *State v. Kearney*, 25 Neb. 262.

In *Nevada*, as to the duties of the fire wardens, see *Nevada Gen. Stat.* (1885), § 2156.

In *New Hampshire*, fire wardens may pull down a building to stop a conflagration. *New Hampshire Pub. Stat.* (1891), p. 327. This statute is constitutional. *Dartmouth College v. Woodward*, 1 N. H. 130. The enlargement of a house within the fire limits, contrary to the ordinance, will not be enjoined, if the risk from fire is not thereby increased. *Manchester v. Smyth*, 64 N. H. 380.

As to the power of town fire-wards to pull down buildings, etc., see *Portsmouth v. Snell*, 8 N. H. 338.

In *New Jersey*, as to the duties of the fire inspector concerning the erection of external fire escapes, etc., see *New Jersey Rev. Supp.*, p. 685, § 865.

As to the duties of township committees in extinguishing forest fires, see *New Jersey Sess. Acts* (1892), p. 205. As to the restrictions upon municipal power to remove buildings, see *State v. Hightstown*, 45 N. J. L. 127.

In *New Mexico*, it is the duty of town trustees to prevent a deposit of ashes in unsafe places, and to cause all buildings in a dangerous state to be put in a safe condition. *New Mexico Comp. L.* (1884), § 1622, pl. 33.

The *New Netherlands* ordinance of 1658 made it the duty of the burgo-masters to determine what lots should first be built on. *New Netherlands L.*, p. 220.

In *New York*, it is a duty of the village board of trustees, by resolution, to establish fire limits, "describing the same by metes and boundaries, which resolution shall be filed in the office of the village clerk, and be posted in three public places within the corporate bounds, to prevent fires, and provide for their extinguishment." *Bird. New York Stat.* (1890), p. 3265, § 45, pl. 13. As to the right under municipal char-

ters, to destroy a building to stop a conflagration, the duty to indemnify owners, etc., see *New York v. Lord*, 17 Wend. (N. Y.) 285; 18 Wend. (N. Y.) 126; *Stone v. New York*, 25 Wend. (N. Y.) 157; *Russell v. New York*, 2 Den. (N. Y.) 461; *People v. Buffalo*, 76 N. Y. 558; 32 Am. Rep. 337.

The fire wardens cannot authorize the erection of a prohibited structure. *Fire Dept. v. Buffum*, 2 E. D. Smith (N. Y.) 511. Charter authorization to establish regulations for the prevention of fires, was held not to import power to prohibit the erection of wooden buildings of over certain prescribed dimensions. *Hudson v. Thorne*, 7 Paige (N. Y.) 261. But this was an *obiter dictum*. *Troy v. Winters*, 2 Hun (N. Y.) 63. Recovery of the penalty by the fire department does not preclude the proceeding to remove the structure. *New York Fire Dept. v. Kotlowsky* (Sup. Ct. 1885), Real Est. R. & G. 953.

A permit to erect a wooden building within the fire limits, and the proceeding in the work, was held to confer an irrevocable vested right. *Buffalo v. Chadeayne*, 134 N. Y. 163.

In *North Carolina*, enforcement of an alleged unlawful municipal ordinance will not be enjoined. *St. Peter's Episcopal Church v. Washington*, 109 N. Car. 21.

In *Ohio*, a first-class city of first grade may establish or extend fire limits; this applies also to "squares blocked for fire protection." *Ohio Rev. Stat.* (1890), § 8223, pl. 77. See also, as to fire escapes, *Ohio Sess. L.* (1892), p. 415. An ordinance prohibiting the placing of a wooden structure over ten feet high within certain limits, was held not to prevent the removal thereof from one point to another within them; and the city was held liable for interfering, rendering it an obstruction and inducing its being torn down; the owner's agreement to raze it, being void for want of mutuality. *Cleveland v. Lenze*, 27 Ohio St. 383.

In *Oklahoma*, town trustees may establish such "measures of prudence for the prevention or extinguishment of fires as they shall deem necessary." *Oklahoma Stat.* (1890), § 686, pl. 3.

In *Oregon*, it is a penal offense for one to negligently permit fire to pass from his own premises to the injury of another. *Oregon Annot. L.* (1892), § 1787.

In *Pennsylvania*, an ordinance for-

4. **Town-Site Laws.**—The provisions of the federal statutes and the decisions of the federal courts as to entry of town sites, have

bidding one to "erect and build" any shop within certain limits, was held to apply to enlarging and changing a blacksmith shop into a cabinet shop. *Douglass v. Com.*, 2 Rawle (Pa.) 262. Such an ordinance is constitutional. *Respublica v. Duquet*, 2 Yeates (Pa.) 493.

In the absence of charter authorization, a borough cannot prohibit the erection of a wooden building. *Kneedler v. Norristown*, 100 Pa. St. 368; 45 Am. Rep. 384. After due notice, a borough may demolish a wooden building that is being constructed contrary to the ordinance. *Klingler v. Bickel*, 117 Pa. St. 326. One who builds unlawfully, cannot invoke an injunction against demolition. *Aronheimer v. Stokley*, 11 Phila. (Pa.) 283. Compare the case of wooden barroom booths, *Fields v. Stokley*, 99 Pa. St. 306. Also the planing-mill case, *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221.

In *Rhode Island*, one obliged to pay enhanced insurance rates by reason of an adjoining proprietor's violation of such ordinance, may have an action on the case against him therefor. *Aldrich v. Howard*, 7 R. I. 199.

In *South Carolina*, as to the right of fire masters to pull down buildings, see *White v. Charleston*, 2 Hill (S. Car.) 571.

In *Tennessee*, as to the duty of fire inspectors, see *Tennessee Code* (1884), § 2299. An ordinance prohibiting the erection of a wooden building within certain limits, does not, in the constitutional sense, impair the obligation of a prior contract therefor. *Knoxville v. Bird*, 12 Lea (Tenn.) 121; 47 Am. Rep. 326.

In *Texas*, a council may establish fire limits, and may prohibit not only the erection of wooden buildings therein, but also their removal from one point to another therein. *Texas Civ. Stat.* (1889), art. 453. In the absence of express authorization, a municipality cannot establish and declare a wooden building therein to be a nuisance. *Pye v. Peterson*, 45 Tex. 312. As to the remedy for property destroyed to stop a conflagration, see *Keller v. Corpus Christi*, 50 Tex. 614; 32 Am. Rep. 613.

In *Utah*, disorderly obstruction of the extinguishment of a fire is a penal

offense. *Utah Comp. L.* (1888), § 4577.

In *Vermont*, fire departmental districts not over two miles square, may be established on the petition of twenty freeholders to the selectmen, and the filing of a certificate in the town clerk's office. The voters therein become a body corporate. *Vermont Rev. L.* (1880), § 2795. As to a right of appropriation to prevent fires under the statutory expression, "in defense of their common rights and interests," see *Van Sicken v. Burlington*, 27 Vt. 70.

In *Virginia*, as to the duties of the fire marshal, etc., see *Virginia Code* (1887), §§ 1065-6.

In *Washington*, a city of the second class may establish fire limits, and regulate and prevent the erection of combustible structures therein. *Washington Stat.* (1891), § 558.

In *West Virginia*, a town or village council may, for preventing fires, "regulate how buildings shall be constructed." *West Virginia Code* (1891), p. 435, § 9. Charter authorization "to make regulations for guarding against damage from fires," imports power to ordain fire limits, and prohibit the erection of wooden buildings. A building with wooden studding, and with sides covered with sheet iron, is a "wooden" building, within the ordinance. *Charleston v. Reed*, 27 W. Va. 681; 55 Am. Rep. 336.

In *Wisconsin*, a village board may establish limits within which combustible buildings shall not be erected. *Wisconsin Annot. Stat.* (1889), § 892. Equity will not enjoin a threatened violation of such ordinance; and this, though it prescribe the board's duty to get injunction thereof. *Waupun v. Moore*, 34 Wis. 450; 17 Am. Rep. 446.

In *Wyoming*, as to the duties of fire wardens, see *Wyoming Rev. Stat.* (1887), § 1922.

The *Ontario* statute (ch. 174, § 467, pl. 6), authorizing a municipal by-law prohibiting erection, within defined areas, of buildings other than with main walls of brick, etc., and roofing of incombustible material, did not empower Hamilton to enact that, "No roof of any building already erected in the said fire limits shall be relaid or recovered, except with materials before enumerated." *Reg. v. Howard*, 4 Ont. 377.

already been considered in discussing the public land system.¹ It remains to collate certain state legislation and adjudication thereon, not only as bearing upon town enlargement, but also upon the rights and liabilities of towns, town officers and occupants.

In *England*, as to the power of the fire brigade, see *Joyce v. Metropolitan Board of Works*, 44 L. T. 811.

1. PUBLIC LANDS, vol. 19, p. 362. See U. S. Stat. (1878), § 2380 *et seq.* See also *Davis v. Webbald*, 139 U. S. 507.

In *Utah*, the provisions of the town-site law "shall not apply to military or other reservations heretofore made by the *United States*, nor to reservations for lighthouses, custom-houses, mints, or such other public purposes as the interests of the *United States* may require, whether held under reservations through the land office by the title derived from the crown of *Spain*, or otherwise." *Utah Comp. L.* (1888), § 305. See *Dooly Block v. Salt Lake Rapid Transit Co.* (Utah, 1893), 33 Pac. Rep. 229; *Rogers v. Thompson* (Utah, 1893), 33 Pac. Rep. 234.

In *Alabama*, any person can divide his land into town lots, by survey, recording, etc. *Alabama Acts* (1887), p. 93.

In *Arizona*, the authorities of an incorporated town, or if unincorporated, the probate or the county judge may, on petition, cause entry of a town site, survey, etc. *Arizona Rev. Stat.* (1887), § 167. The trustee of a town site may, on petition and with the advice of the school-trustees, establish sites for schools. If the town be a county seat, the trustees may on petition, with the consent of the supervisors, establish a site for a courthouse, etc., § 180.

It was held that a deed by the mayor of Tombstone, conveying 2,100 out of 2,300 lots of a town site to a company, was evidently for speculation, a breach of the trust, and invalid. *Clark v. Titus* (Arizona, 1886), 11 Pac. Rep. 312.

In the Town-Site Act of Congress of 1867, the "occupant," for whom the probate judge holds in trust, is the one in actual possession. *Singer Mfg. Co. v. Tillman* (Arizona, 1889), 21 Pac. Rep. 818.

In *Arkansas*, where, under U. S. Rev. Stat., § 2387, the patent for a town site has issued to the mayor, he holds the legal title of town lots in trust for the occupants thereof. *Jones v. Eureka Imp. Co.*, 53 Ark. 191.

In *California*, under the town-site

acts of Congress, the interest of an occupant who is an unmarried woman, remains her separate property on her marriage; the fact that the husband advanced the funds necessary to get a conveyance from the town authorities, does not render it community property. *Morgan v. Lones*, 80 Cal. 317. But compare *Morgan v. Lones*, 78 Cal. 58. Under that of 1867 to quiet titles in Petaluma, the town had the right to the use of the public squares and streets, as against individuals' adverse possession acquired after March 1st, 1867. *Jones v. Petaluma*, 36 Cal. 230. But under those of 1864 and 1865, pre-emption rights therein could be acquired by *bona fide* settlers. *Jones v. Petaluma*, 38 Cal. 397. Compare *Neil v. McNear*, 57 Cal. 424. Under that of 1866 to quiet title in Benicia, a deed by a *bona fide* occupant conveying all subsequently acquired title, will prevent enforcement of title from the town. *Carroll v. Benicia*, 40 Cal. 386. Under that of 1867 for the relief, etc., the town authorities were mere trustees for the occupants; the trust to be exercised as the legislature might prescribe. In a petition to them for a deed, a reference to a map showing a street laid out, would not effect a dedication to public use. *Cerf v. Pfleging*, 94 Cal. 131. Compare *Eversden v. Mayhew*, 85 Cal. 1; *San Leandro v. LeBreton*, 72 Cal. 170. The exception as to mining property, U. S. Rev. Stat., § 2392, applies only to a mine that one had reason to believe existed at the time of the town-site grant. *Smith v. Hill*, 89 Cal. 122; *Richards v. Dower*, 81 Cal. 44. Compare *Dower v. Richards*, 73 Cal. 477; *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482. In a conveyance under the act of 1867, description by reference to a street does not have the effect of dedication. *Cerf v. Pfleging*, 94 Cal. 131. A patent to a town site conveys a perfect title in fee, except as to such land as was known to contain valuable mines before issuance of the patent. *McCormick v. Sutton*, 97 Cal. 373, citing *Deffebach v. Hawke*, 115 U. S. 392; *Davis v. Webbald*, 139 U. S. 507.

In *Colorado*, as to the disposal of lots under the town-site acts of Con-

gress, to whom, etc., practice, etc., see *Colorado* Annot. Stat. (1891), § 4335; *Cofield v. McClellan*, 1 Colo. 371; 16 Wall. (U. S.) 334; *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 450; *Denver v. Kent*, 1 Colo. 342; *Cook v. Rice*, 2 Colo. 137; *Eyster v. Gaff*, 2 Colo. 228; *Logan v. Clough*, 2 Colo. 137; *Clayton v. Spencer*, 2 Colo. 378; *Smith v. Pipe*, 3 Colo. 187; *Georgetown v. Glaze*, 3 Colo. 230; *Tucker v. McCoy*, 3 Colo. 286; *Downing v. Brown*, 3 Colo. 571; *Mills v. Buttrick*, 4 Colo. 123; *Adams v. Binkley*, 4 Colo. 247; *Poire v. Wells*, 6 Colo. 406; *Anderson v. Bartels*, 7 Colo. 256; *Schwenke v. Union Depot, etc., Co.*, 7 Colo. 512; *Murray v. Hobson*, 10 Colo. 66; *Mills v. Hobson*, 10 Colo. 81; *Aspen v. Rucker*, 10 Colo. 184; *Aspen v. Aspen Town, etc., Co.*, 10 Colo. 191; *Chever v. Horner*, 11 Colo. 69; 142 U. S. 122; *Denver v. Pearce*, 13 Colo. 383; *Wheeler v. Wade*, 1 Colo. App. 66; *Webber v. Petty*, 2 Colo. App. 63; *Rice v. Goodwin*, 2 Colo. App. 267.

In *Idaho*, as to the duty of corporate authorities or of the probate judge to enter town sites at the *United States* land office, and establish claims of inhabitants under acts of Congress and regulations of the secretary of the interior, see *Idaho* Rev. Stat. (1887), § 2200 *et seq.*

An action under the town-site act to settle adverse claims, is in the nature of a suit in equity to quiet title. *Forsythe v. Richardson*, 1 Idaho 459.

Occupancy of one legal subdivision does not draw to it another legal subdivision, though immediately adjoining. *Thompson v. Holbrook*, 1 Idaho 609.

In *Illinois*, as to the proper certification of a town plat, see *Auburn v. Goodwin*, 128 Ill. 57; *Eckhart v. Irons*, 128 Ill. 568. As to the proper acknowledgment, see *Gould v. Howe*, 131 Ill. 490.

In *Indiana*, as to the platting of towns, see *Indiana* Rev. Stat. (1888), § 3374.

In *Iowa*, a town plat showing in the center a tract marked "Public Square," is held to import a dedication. *Young v. Oskaloosa* (Iowa, 1893), 56 N. W. Rep. 177.

In *Kansas*, the provision for entry of town sites is like that of *Idaho*, already mentioned. *Kansas* Gen. Stat. (1889), § 7038. As to the copartnership rights and liabilities of owners of town lots, see § 7051 *et seq.*

As to the rights of occupants and claimants, and the duties of the pro-

bate judge and corporate authorities thereupon, see *Riggs v. Anderson*, 47 Kan. 66; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Independence Town Co. v. DeLong*, 11 Kan. 152; *Sherry v. Sampson*, 11 Kan. 611; *McTaggart v. Harrison*, 12 Kan. 62; *Emmert v. DeLong*, 12 Kan. 67; *Setter v. Alvey*, 15 Kan. 157; *Fessler v. Haas*, 19 Kan. 216; *Yoxall v. Osborne County*, 20 Kan. 581; *Allen v. Houston*, 21 Kan. 194; *Mathews v. Buckingham*, 22 Kan. 166; *Jackson v. Winfield Town Co.*, 23 Kan. 542; *Rathbone v. Sterling*, 25 Kan. 444; *Guffin v. Linney*, 26 Kan. 717; *Doster v. Sterling*, 33 Kan. 381; *Marysville Invest. Co. v. Munson*, 44 Kan. 491; *Atchison, etc., R. Co. v. Manley*, 42 Kan. 577; *Sherman Center Town Co. v. Russell*, 46 Kan. 382; *Greiner v. Fulton*, 46 Kan. 405.

A street dedicated by filing the plat of a congressional town site, on vacation reverts to the abutting owners in proportion to frontage, according to *Kansas* Act of 1872, and not according to the second proviso of § 811 of Gen. Stat. (1889). *Showalter v. Southern Kan. R. Co.*, 49 Kan. 421.

In *Kentucky*, as to the duties of the trustees in the platting of towns and the conveyance of lots, see *infra*, this title, *Powers and Privileges*.

In *Michigan*, as to the platting of town sites, see *Michigan* Gen. Stat. (1890), § 1473 *et seq.*

The fact that village police regulations were enforceable within the area of a proposed township common, was held to raise no presumption against the township proprietary rights therein. *Atty. Gen'l v. Burrell*, 31 Mich. 25.

In *Minnesota*, as to the survey and dedication of town plats, see *Minnesota* Gen. Stat. (1891), § 2166 *et seq.* As to the entry of town sites under the Act of Congress of 1854, see § 4091.

Under the Act of Congress of 1844, the *United States* land officers' allowance or disallowance of a town-site entry is conclusive. *Mankato v. Meagher*, 17 Minn. 265. But the state courts may determine who were the occupants thereunder. *Leech v. Rauch*, 3 Minn. 448. That the county judge properly performed his duty as trustee, will be presumed beyond any questioning by a stranger to the title. He may convey to beneficiaries before issuance of the patent by the *United States*. *Taylor v. Winona, etc., R. Co.*, 45 Minn. 66. A deed of the fee from the trustee will be subject to the

dedication, though at the time thereof there was no grantee capable of taking. *Winona v. Huff*, 11 Minn. 119, *citing Cincinnati v. White*, 6 Pet. (U. S.) 440. The trustee's deed estops him and his representatives from denying that the grantee was an occupant. *Morris v. Watson*, 15 Minn. 212. The right of a *bona fide* purchaser from an occupant, was held to be superior to that of the holder of a prior unrecorded conveyance. *Davis v. Murphy*, 3 Minn. 119. A right of entry may, even after the plat is made and recorded, be lost by abandonment. *Weisberger v. Tenn*, 8 Minn. 456. Agreements as to entry of town sites on unsurveyed lands are not necessarily illegal. *Wood v. Cullen*, 13 Minn. 394. The fact that a penalty is imposed upon an owner selling before due record of the plat, etc., does not import avoidance of the sale. *De Mers v. Daniels*, 39 Minn. 158.

The occupant takes subject to the public easement in the adjoining street. *Harrington v. St. Paul, etc.*, R. Co., 17 Minn. 215. The abutter has an easement in the street, the full width, for light and air. *Adams v. Chicago, etc.*, R. Co., 39 Minn. 286; *Lamm v. Chicago, etc.*, R. Co., 45 Minn. 71.

Joint owners platting a town, have no easement or right of way distinct from that granted the town. *Patterson v. Duluth*, 21 Minn. 493. A corporation may take town-site land. *Mankato v. Meagher*, 17 Minn. 265. A county may be a beneficiary therein, and acquire absolute title, in fee. *Blue Earth County v. St. Paul, etc.*, R. Co., 28 Minn. 503. In order to title, occupancy must be actual and not merely constructive. *Carson v. Smith*, 12 Minn. 546. Upon the decease of an occupant, his minor heirs are not prejudiced by failure to file claims in due time. *Coy v. Coy*, 15 Minn. 119. As to when the title vests, see *Castner v. Gunther*, 6 Minn. 119. As to requisites of an occupant's procedure to compel conveyance by the town authorities, see *Cathcart v. Peck*, 11 Minn. 45. As to the reservation of a right to conduct water across streets, see *Wilder v. De Cou*, 26 Minn. 10.

The court may direct an incorrectly numbered plat to be amended. *Rice v. Kelset*, 42 Minn. 511. In a conveyance, reference to lot and block, according to the recorded plat, was held to prevail over bounds, course, and dis-

stance. *Coles v. Yorks*, 36 Minn. 388. But compare *Turnbull v. Schroeder*, 29 Minn. 49; *Rochat v. Emmett*, 35 Minn. 420.

Where, after the owner had conveyed an inland block with reference to his plat, the water of Duluth Bay encroached thereon, it was held that the grantee could not reclaim and use the intervening submerged block and street. *Gilbert v. Eldridge*, 47 Minn. 210. Compare *Duluth v. St. Paul, etc.*, R. Co., 49 Minn. 201 (diagram) 202.

On a town plat, a notation, "County Block," was held not to be sufficient evidence of a donation or grant to the county. *Hennepin County v. Dayton*, 17 Minn. 260. So, also, a notation, "Reserved for right of way, Line of S. M. R. R." was held to establish no donation to a railroad corporation of a strip that was left undivided into lots. *Watson v. Chicago, etc.*, R. Co., 46 Minn. 321.

Parol evidence was held admissible to supplement a plat that failed to comply with the town-site law. *Borer v. Lange*, 44 Minn. 281; *Reed v. Lamm*, 28 Minn. 306; *Ames v. Lowry*, 30 Minn. 283; *Sanborn v. Mueller*, 38 Minn. 27. So, also, to determine whether a blank space upon the plat was intended to be dedicated for a public wharf. *Hurley v. Rum River Boom Co.*, 34 Minn. 143 (diagram at p. 145), *citing Eastland v. Fogo*, 58 Wis. 274. Compare *Downer v. St. Paul, etc.*, R. Co., 23 Minn. 271; also the "Eagle Park" case, *Middleton v. Wharton*, 41 Minn. 266.

The trustee has no power to dedicate land for streets. *Buffalo v. Harling*, 50 Minn. 551. As to the sufficiency of a deed executed by the members of the council, see *Remillard v. Blackmar*, 49 Minn. 490.

In *Missouri*, as to the restrictions imposed by the amendatory act of 1887 concerning plats and additions, see *State v. Chase*, 42 Mo. App. 343.

In *Montana*, on petition of a majority of the resident property owners to the corporate authorities of the town, or if it be unincorporated, to the probate judge, a town site may be entered in the public land office, in trust, etc., within the Act of Congress of 1867. A survey and plat shall be made, and no lot shall exceed 4200 square feet. Claimants of lots must file a statement within two months after the date of the first publication of notice. Each may preempt two lots, "and such additional lot or

IV. GOVERNMENT—1. Governing Bodies; Ordinances.—In *England*, from time immemorial, there have been towns governed by boards

lots upon which such claimant may have substantial improvements of the value of not less than \$250. If aggrieved, he may appeal from the award of the authorities or judge, upon the evidence, and receive deed after the final determination by the district court. Plats must be acknowledged, and must designate the surveyor's monuments. A copy must be filed with the county clerk, the paper whereof must not exceed 30 by 36 inches. *Montana Comp. Stat.* (1887), p. 1218 *et seq.*

The trust position of the probate judge under the town-site law is *quasi-judicial*. In any collateral proceeding, his deed is conclusive. *Ming v. Foote*, 9 Mont. 201. As to requisites of entry for dedication, see *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102.

The judge of probate cannot lawfully establish by plat a street over lands actually occupied as a residence when the entry was made. *Helena v. Albertose*, 8 Mont. 499.

In *Nevada*, upon receipt by the clerk of the district court of the papers to be filed with him in the cases mentioned in the town-site acts of Congress of 1844 and 1866, he must notify the claimant or his agent that the claim is contested, and either party may appeal within twenty days. *Nevada Gen. Stat.* (1885), § 402. As to the duties of the corporate authorities to convey title under the Act of Congress of 1867, see § 411 *et seq.*

The town-site act of Congress is paramount to the state law. The intent therein was to protect actual citizens against mere speculators. Only actual occupancy entitles one to a deed. *Lechler v. Chapin*, 12 Nev. 65. The deed may be collaterally attacked for the grantee's non-occupancy. *Treadway v. Wilder*, 8 Nev. 91; 9 Nev. 67. Subdivision and platting are requisite to appropriation. *Robinson v. Imperial Silver Min. Co.*, 5 Nev. 44. Compare *Stark v. Starr*, 1 Sawyer (U. S.) 15.

In *New Jersey*, the county superintendent of schools fixes the boundaries of school districts. *New Jersey Revision* (1877), p. 1074, § 24.

In *New Mexico*, as to the procedure concerning town sites, see *New Mexico Comp. L.* (1884), § 1706.

In *Ohio*, any proprietor can have a hamlet or village laid out, or subdivi-

sion or addition to a municipal corporation made, by survey, platting, erection of corner-stones, etc. *Ohio Rev. Stat.* (1890), § 2597. For procedure on revision of plats, and renumbering of lots, see § 2619. As to when a conveyance operates as a revocation of the dedication of a street on a plat, see *Lockland v. Smiley*, 26 Ohio St. 94.

In *Oklahoma*, as to town-site procedure, see *Oklahoma Stat.* (1890), § 775 *et seq.* As to appeal from an award of the trustees, see *McDaid v. Ter.* (Okl. 1892), 30 Pac. Rep. 438.

The Federal Act of 1890 to provide for town-site entries of lands in *Oklahoma*, empowered the secretary of the interior to provide for an appeal to the commissioners of the general land office in case of contest. Pending an appeal from the trustees, they must decline to issue a deed to the appellee. *McDaid v. Ter.*, 1 Okl. 92, citing *Moore v. Robbins*, 96 U. S. 530, and *distinguishing Snyder v. Sickles*, 98 U. S. 210.

In *Oregon*, as to the requisites of procedure in town platting, see *Oregon Annot. L.* (1892), § 4178 *et seq.*

As to the rights of parties claiming under the *Oregon Territorial Act* of Congress of 1848, and the town-site acts, see *Stark v. Starr*, 6 Wall. (U. S.) 402 (decided in 1867), and *Stark v. Starr*, 1 Sawyer (U. S.) 15 (decided in 1870).

In *Utah*, as to the procedure under the act of 1869, in furtherance of the privileges conferred by the Act of Congress of 1867, see *Utah Comp. L.* (1888), ch. 5, p. 144. As to platting and dedication by the owner, see *Sess. L.* (1890), ch. 50.

In *Washington*, see *Newhouse v. Simino*, 3 Wash. 648; *Rund v. Jensen*, 3 Wash. 785; *Kellogg v. Sessions*, 4 Wash. 814.

The *Wisconsin* statutory requirement as to the plat must be complied with as essentially as in case of conveyance between individuals. *Emmons v. Milwaukee*, 32 Wis. 434.

On the formation of a new county, the successor of the county judge may execute the trust deed. *Whittlesey v. Hoppenyan*, 72 Wis. 140; *Tucker v. Whittlesey*, 74 Wis. 74.

In *Wyoming*, as to the procedure in disposal of town-site lands, see *Wyo-*

which have many of the powers and duties of town boards in some of the *United States*.¹

In those states in which the county is the chief political unit, many of the sanitary and police powers that in other states are vested in the town authorities, are vested in the county board. In such states, however, these powers are sometimes relegated² to certain towns by special municipal charter.³ In many states, the town elects a board of trustees to execute its principal corporate powers, their function as a local board resembling that of the county board of supervisors or commissioners in the former class of states. In *New England*, *Nebraska*, and some other

ming Rev. Stat. (1887), § 1388 *et seq.*, and amendment, Sess. L. (1888), ch. 46. Requisites of the plat, § 1401.

1. That of Romney affords an interesting example of our English prototype. In the library of St. Catherine's Hall, Cambridge, is preserved a copy of the "Customal" of the town of Romney, in the time of Edward III. It is embodied in the town clerk's register for 1353. It is in Norman, and the following is a literal translation of pertinent portions:

"**Imprimis.**—It is used from year to year to elect twelve jurats to guard and govern the said town, according to the points of their commission. . . . They shall render to us a reasonable account of all their receipts and expenses. . . . 2. *Item.*—If any baron, after election by the said commonality, will not be obedient to serve the said office of jurat, the bailiff, or all the commonality, shall go to his house, and the said disobedient person, his wife and his children and the rest of his family, they shall oust from the house, and shall close the windows, and his goods shall they seal up and sequesterate, and so they shall remain, until he is willing to do the said office of jurat. . . . 4. *Item.*—It is used that the jurats may, by virtue of their office, take distress and make sequestration, without bailiff, for debts due to the commonality. . . . 5. *Item.*—The said jurats may make attachment, without bailiff, upon all those whom they find rebels touching the service of our lord the king. . . . 12. *Item.*—It is used that, in case a man and his wife, dwellers and free in the said town, have children between them free born, and the father and mother die, or the father die and the widow take another husband, or she die a widow, then the goods and chattels in the hands of the executors or ad-

ministrators found within the franchise, shall be seized by the jurats, . . . and when they ascertain the quantity, they shall deliver them to him who is the nearest of blood, to whom no inheritance can descend, who of right shall have the ward if he will sue for it, finding sufficient pledges. . . . 16. *Item.*—It is used that if a strange man dwell in the town, in a suspicious place, the jurats and the bailiff shall demand of his host if he will engage that this suspicious person shall bear himself as a lawful man. . . . If he says he is a man of good fame, let him have a reasonable day to get from his country a letter of good conversation under an authentic seal. . . . 37. *Item.*—If any be found cutting a purse within the franchise, at the suit of the party, let him be put in the pillory, and afterwards, at the said suit, let one ear of his head be cut off, and let him be led to one end of the town, and he shall abjure the town without any return. . . . 40. *Item.*—It is used that no shipway shall be holden unless the warden be there in his proper person, sitting, and with him the mayors and bailiffs of the cinque-ports, first to make inquest by twelve barons there sworn, if any man has spoken treason against our lord the king or his kingdom. Or if any man has counterfeited the seal of our lord the king, and of false moneyers, and treason found and concealed." See 7 L. Mag. & Rev. (1859) 300.

2. *Maryland* Pub. Gen. Laws (1888), p. 406 *et seq.* See also COUNTIES, vol. 4, p. 345; MUNICIPAL CORPORATIONS, vol. 15, p. 1028. As to boards of equalization, see *supra*, this title, *Enlargement; Severance*.

3. See the amended charter of Hagerstown, *Maryland* Sess. L. (1892), p. 34 *et seq.*; and the charter of Luray, *South Carolina* Acts (1891), p. 1380.

states, the statutes commit to the electors at large, assembled in an annual meeting, the main direction of the town business.¹

It would be difficult, without inconveniently cumbersome exceptions, to formulate any useful general statement of legislative and executive powers of "meetings," "selectmen," "chosen freeholders," "corporate authorities," "supervisors" and "trustees," in police and sanitary and cognate matters. An assertion that, even in so small a state as *Rhode Island* or *Delaware*, the general statutes leave little scope for local ordinances, would be inaccurate. It is indispensable to resort to specification and collation of the pertinent statutory provisions of the states respectively.²

1. See *infra*, this title, *Meetings*.

2. See *supra*, this title, *Fire Limits*; *infra*, this title, *Powers and Privileges*, also *Officers—Powers and Duties*. See also MUNICIPAL CORPORATIONS, vol. 15, pp. 1039, 1057, 1080, 1122, 1167; ORDINANCES, vol. 17, p. 235.

In *Alabama*, "the corporate authorities" of the town may pass necessary by-laws and ordinances; license amusements and liquor-selling; prohibit gaming, houses of ill-fame and breaches of the peace; establish watches and patrols; repair streets and drains; license carriages running for hire; appoint, and fix compensation of, necessary officers; impose fines and sentence men (but not women) to labor on streets; supply vacancies in their own body; purchase, hold, and dispose of real and of necessary personal property; and levy town taxes. *Alabama Code* (1886), §§ 1500, 1504.

Otherwise, as to an ordinance prohibiting the importation of second-hand clothing. *Greensboro v. Ehrenreich* (Ala. 1887), 2 So. Rep. 725.

A charter authorizing the prohibition of "retailing," etc., was held not to authorize an ordinance prohibiting a sale in less quantities than twenty gallons. *Harris v. Livingston*, 28 Ala. 577.

An ordinance was held valid which made it the duty of the marshal to impound hogs running at large within the corporate limits, and sell them upon forty-eight hours' notice, if not redeemed by the owner paying the expense; and it could apply to animals of non-residents so running. *Folmar v. Curtis*, 86 Ala. 354.

Courts will not set aside a by-law, unless its unreasonableness be clearly shown. *Marion v. Chandler*, 6 Ala. 899. Further, as to ordinances, see *Birmingham v. Alabama, etc.*, R. Co. (Ala. 1893), 13 So. Rep. 141.

In *Arizona*, the board of town trustees appoint the executive officers; levy taxes; and make ordinances to regulate the registration of voters, to provide for the preservation of the peace, to establish a board of health, to maintain pest-houses, to procure legal advice, to restrain cattle and dogs, to prohibit immoral shows, to fix licenses for carrying on business, games, or amusements, to regulate hours for liquor-selling and gambling, to prohibit sales to minors or habitual drunkards, to designate places of imprisonment, and to apply the fund from licenses and fines. *Arizona Rev. Stat.* (1887), § 161 *et seq.*

In *Arkansas*, the town council may fill vacancies in their board, provide by ordinance for the election of a treasurer, marshal, and necessary subordinate officers, and prescribe their duties and compensation. *Arkansas Dig. Stat.* (1884), § 795.

The mayor, as president, cannot order a member to be forcibly excluded from a council meeting for any disorderly behavior that does not threaten personal injury, or arrest the progress of business. *Thompson v. Whipple*, 54 Ark. 203.

The council cannot appropriate money to aid in building a courthouse for the county, to be located in the town. *Russell v. Tate*, 52 Ark. 541.

A town ordinance which unqualifiedly makes the keeping of bees a nuisance, is invalid. *Arkadelphia v. Clark*, 52 Ark. 23. So, also, is an ordinance imposing convict labor on streets. *Ward v. Little Rock*, 41 Ark. 526; 48 Am. Rep. 46.

A municipal ordinance may be void in part and valid *pro tanto*. *Eureka Springs v. O'Neal*, 56 Ark. 350.

A license fee of \$25 for a ferry privilege, was held to be a reasonable

regulation and not a tax, in *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370.

Under *Arkansas* Act, 1891, p. 97, a conviction in a mayor's court for violation of a town ordinance, will bar a prosecution before a justice of the peace for the same offense, although the state penalty be not for the same. *Richardson v. State*, 56 Ark. 367.

Under *Arkansas* Dig. L., §§ 5860-5863, an incorporated town is entitled to fines collected in the mayor's court, for violations of town ordinances imposing penalties for acts which were also offenses against the state. *Hackett City v. State*, 56 Ark. 133.

Under *Arkansas* Stat. (1884), § 764, municipal power to punish "lascivious behavior in public places" was held not to authorize a town ordinance punishing "any person whose known character is that of a prostitute." *Buell v. State*, 45 Ark. 336.

In *California*, as to governing bodies of the six classes of the municipal corporations respectively, see *California* Act of 1883; *California* Pol. Code (1885), p. 737 *et seq.*

The town board of trustees may establish by ordinance a board of health of five persons, one to be a practicing physician, graduate of some reputable school of medicine, and one, if practicable, a civil engineer. *California* Pol. Code (1885), § 3061.

Under the *California* constitution, the words, "system of town governments," refer to town organizations, in their general features like those of other states. When the system is established, local legislatures make local rules; until then the state legislature cannot delegate the power to the people of a certain territory. *Ex p. Wall*, 48 Cal. 279. A charter provision that a majority of the board of town trustees shall be a quorum, imports that a majority may organize at the first meeting time. *Oakland v. Carpenter*, 13 Cal. 540.

An ordinance prohibiting the sale of opium, was held valid. *Ex p. Hong Shen*, 98 Cal. 681. An ordinance that no hospital or asylum for the insane shall be constructed of brick or iron or stone, or within 400 yards of any dwelling or school, and that a separate house be required for each of certain diseases named, was held unreasonable and void. *Ex p. Whitwell*, 98 Cal. 73. An ordinance forbidding the maintenance of a private asylum, was held to pro-

hibit a lawful business, and to be in valid. *Ex p. Whitwell*, 98 Cal. 73. An ordinance forbidding liquor in any dance cellar or place where female wait or attend on any person, was held not to contravene *California* Const. art. 20, § 18, namely, that no person shall, on account of sex, be disqualified from pursuing any lawful vocation. *Ex p. Hayes*, 98 Cal. 555. See the requisites of attestation and the publication of ordinances of a municipal board, in *San Diego County v. Seifert*, 97 Cal. 594. A town ordinance prohibiting any public laundry, except in certain specified blocks, without a written permit from the town trustees, is unconstitutional, being an unreasonable interference with a lawful occupation. *Ex p. Sing Lee*, 96 Cal. 354, citing *Yick Wo v. Hopkins*, 118 U.S. 356. Further, as to municipal ordinances, see *Weber v. Gill*, 98 Cal. 462; *Partridge v. Lucas*, 99 Cal. 519; *Jacobs v. San Francisco County* (Cal. 1893), 34 Pac. Rep. 630; *Williams v. Bisagno* (Cal. 1893), 34 Pac. Rep. 640. An ordinance imposing a license fee of \$50 per month for selling intoxicating liquors, was held not to be presumed, as a matter of law, to be oppressive, unreasonable, or prohibitory of trade. *In re Guerrero*, 69 Cal. 88.

Under the *Colorado* Act of 1889, the corporate authority of towns organized for general purposes, is vested in a board consisting of one mayor and six trustees. *Colorado* Annot. Stat. (1891), § 4508.

A town board or city council will not be enjoined from legislating on a matter within the scope of its charter authority. *Lewis v. Denver City Water Works Co.* (Colo. 1893), 34 Pac. Rep. 993.

The rule (1 Dill. on Mun. Corp., § 89, 316, 329) that an ordinance must not be repugnant to the policy of the state, was applied to a prohibition of selling goods on Sunday, in *Durango v. Reinsberg*, 16 Colo. 327.

Colorado Gen. Stat., § 3312, allowing a municipal council to declare what is a nuisance, and abate it by penalty does not authorize an ordinance discriminating between individuals, by prohibiting the storing of green or dry hides or pelts within the corporate limits. *May v. People*, 1 Colo. App. 157.

An ordinance more comprehensive than the common law cannot be tested by common-law rules. Under the ordinance of the town of Lamar tha

"no person shall engage in quarreling, nor shall invite or defy," etc., the proprietor of a store cannot use force to expel from the room one who refuses to depart when ordered out. *Metcalf v. People*, 2 Colo. App. 262.

A recital in an ordinance that "public welfare and safety require" an act to be done, is not conclusive upon the judiciary; and it is so held as to an ordinance ordering the confining of the channel of a ditch to a certain width by fluming, to prevent washing away property. *Platt, etc., Canal, etc., Co. v. Lee*, 2 Colo. App. 184, *citing* *Mugler v. Kansas*, 123 U. S. 661.

Where the town trustees have assumed control of liquor-selling, a saloon-keeper holding a license under their ordinance therefor, is not liable, in the absence of a Sunday ordinance, to be indicted under the state Sunday Law, *Colorado Gen. Stat.*, § 839. *Cunningham v. People*, 1 Colo. App. 155, *citing* *Heinssen v. State*, 14 Colo. 228. But *compare* *McInerney v. Denver*, 17 Colo. 302. As to an ordinance regulating livery stables, see *Phillips v. Denver* (Colo. 1893), 34 Pac. Rep. 902.

In *Connecticut*, the selectmen "shall superintend the concerns of the town, adjust and settle all claims against it, and draw orders on the town treasurer for their payment," and "require of the treasurer a sufficient bond," etc. They shall make annual returns to the governor, of the number of deaf, dumb and blind persons; shall contract with the officers of the Retreat at Hartford for the support of the insane poor; shall appoint examiners of the land records; and may appoint special constables and truancy officers. *Connecticut Gen. Stat.* (1888), § 64 *et seq.* They shall warn town meetings, § 33. They may cause indigent imbecile children to be sent to the school at Lakeville, § 489; may have unsafe buildings repaired or removed, § 2629; may license the passing of wild animals through the town, § 2630; may license the manufacture and sale of compounds more explosive than gunpowder, § 2631; and may compel the removal of gunpowder, § 2638. They shall inspect facilities for escape from fire, § 2645; shall, upon request, apportion division fences, § 2279; shall, upon application, review the fence-viewers' appraisement of repairing the fence around a common field, § 2299. So, also, as to repair of drains upon inspection by the lowland

scavengers, §§ 2041, 2050. They shall, on application, cause dams and reservoirs to be inspected by the board of civil engineers, § 3698; shall cause owners of unregistered dogs to be prosecuted, § 3747; may lay out ways or discontinue them, §§ 2699, 2708; shall remove encroachments on highways, §§ 2674, 3252; shall maintain guideposts, § 2697; shall compel needed repair of turnpikes, § 2732; shall regulate as to railroad crossings and bridge guards, §§ 3486, 3502; and may license auctioneers, exhibitions, junk-shops, pawn-brokers, and itinerant physicians, § 2993 *et seq.* They supervise the enrollment of the militia, § 3140. They may forbid the sale of spirituous liquors to persons receiving town aid, § 3089; shall provide standard weights and measures, § 3976; shall provide for impounding animals, § 3320; shall apprehend rioters and disperse loiterers, §§ 1502-5. They may prevent the withdrawal of a bastardy complaint, § 1209; and may control the erection and maintenance of electrical fixtures, § 3946. The selectmen of certain towns may designate shellfish grounds, §§ 2313, 2326, 2352, 2378.

As to the liability of selectmen for their acts in *Connecticut*, see *infra*, this title, *Officers—Liabilities*.

The selectmen cannot deputize a performance of their duties; their authority is a personal trust. *Pinney v. Brown*, 60 Conn. 164.

A vote authorizing the selectmen to pay bounties, has been held not to empower them to give a note therefor. *Ladd v. Franklin*, 37 Conn. 53.

The selectmen, under their general powers of superintendence, may employ counsel and spend money in opposing a petition to the legislature to divide the town, apportion the property and liabilities, etc. *Farrel v. Derby*, 58 Conn. 234.

The selectmen may enter into a contract with a person to operate a ferry. *Rocky Hill v. Hollister*, 59 Conn. 434.

The selectmen of one town have power *ex officio* to settle an account presented by another town for supplies to a pauper of the former. *Sharon v. Salisbury*, 29 Conn. 113.

Further, as to the powers of selectmen, see *Porter v. Blakely*, 1 Root (Conn.) 440; *Leavenworth v. Kingsbury*, 2 Day (Conn.) 323; *Knapp v. Lockwood*, 3 Day (Conn.) 131; *Burlington v. New Haven, etc., R. Co.*,

26 Conn. 51; *Whitlock v. West*, 26 Conn. 406.

A by-law giving half the penalty to the informer, was held enforceable by a *qui tam* action in the name of the informer and the town treasurer. *Bradley v. Baldwin*, 5 Conn. 288.

The statutory requirement of the publication of an impounding by-law in a newspaper, "as the town shall direct," was held not to be complied with by a publication upon the mere order of the town clerk; and the by-law to be void. *Higley v. Bunce*, 10 Conn. 436.

A penal ordinance is not invalidated by the fact that one's conviction under it still leaves him subject to prosecution under statute. So held as to a prohibition of policy playing. *State v. Flint* (Conn. 1893), 28 Atl. Rep. 28.

In the *Dakotas*, the town trustees are to purchase, insure, and hold necessary property for the use of the corporation; organize fire companies, and procure the apparatus for extinguishment; regulate the storage of gunpowder and the deposit of ashes; appoint fire wardens; prevent outfires and discharge of fire-works; declare and abate nuisances; restrain animals; prevent gambling and prostitution; license liquor-selling, auctions, peddling, and exhibitions; establish markets and local slaughter houses; lay out and keep repaired and unincumbered streets and sewers; provide for the preservation of the peace; purchase, lay out, and regulate cemeteries; plant trees along the streets, and preserve the public squares; levy taxes; make necessary by-laws and ordinances; enact fines and penalties; and grant franchises for street railways, water and gas pipes. *Dakota Comp. Laws* (1887), § 1043.

Either publication or posting is a prerequisite to a binding enactment of the by-laws. *O'Hara v. Park River*, 1 N. Dak. 279.

In *Delaware*, each town elects annually a board of three commissioners to regulate the streets, "prohibit any dangerous sport or practice," prevent "turbulent assemblages of negroes or boys within the town after night or on the Sabbath day," and therefor make ordinances and penalties. *Delaware Laws* (1874), p. 249, § 7.

In *Florida*, many of the powers and duties of the town council are like those of the *Dakotas* already mentioned. Moreover, it may, with the approval of

a majority of the registered voters, borrow money and pledge the credit of the town. *Florida Rev. Stat.* (1892), § 675.

As to the municipal power to establish markets, see *Jacksonville v. Ledwith*, 26 Fla. 163.

In *Georgia*, the governing body is a council consisting of a mayor, recorder, and five councilmen. *Georgia Code* (1882), § 779. The powers of the council are similar to those of the council in *Florida*, already mentioned. Moreover, it may organize work-gangs of persons convicted of violating the ordinances and not paying the fines. § 786.

A town has only such powers as are expressly granted by statute, or are incident to such grant. *Turner v. Forsyth*, 78 Ga. 683.

A town council made a court, can inflict a fine for contempt, and enforce execution therefor. *Swafford v. Berrong*, 84 Ga. 65.

Breaking a pound and liberating a cow (after the marshal had completed the impounding), was held not to be a violation of an ordinance prohibiting one from "opposing or interrupting any officer in the execution," etc. *Rome v. Omburg*, 22 Ga. 67.

Under charter authority to grant or withhold liquor licenses, and to establish police regulations generally, a town cannot, after granting a license, enact and enforce an ordinance prohibiting sales of liquor whenever "any denomination of Christian people" are holding divine service anywhere in the town. *Gilham v. Wells*, 64 Ga. 192.

The portion of a Sunday ordinance prohibiting an offense punishable by the state law, was held void. *Rothschild v. Darien*, 69 Ga. 503.

As to when the reasonableness of an ordinance regulating speed of trains in the streets, may be left to a jury, see *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500.

An ordinance prohibiting sales of meats elsewhere than in a public market, was held not unreasonable in *Henry v. Macon* (Ga. 1893), 18 S. E. Rep. 143. Further, as to municipal ordinances, see *Collins v. Hall* (Ga. 1893), 17 S. E. Rep. 622; *Brunswick v. King* (Ga. 1893), 17 S. E. Rep. 940.

In *Idaho*, the powers and duties of the board of town trustees are similar to those of such body in the *Dakotas*. They are set forth in the thirty-six sub-sections of *Idaho Rev. Stat.* (1887),

§ 2230, and in § 2242 *et seq.* As to its power of annexing, see *supra*, this title, *Boundaries—Enlargement.*

The *Illinois* Act of 1883 authorizes town trustees to protect from inundation by levees, dykes, etc. *Illinois* Rev. Stat. (1891), p. 287c. That of 1874 prohibits town boards from licensing houses of ill-fame. *Illinois* Rev. Stat. (1891), p. 271, § 227.

The *Illinois* Act of 1831, conferring upon the president and town trustees the power to license shows, etc., was held to suspend the requirement of the act of 1829, of a license from the county treasurer. *Woodward v. Turnbull*, 4 Ill. 1.

Although town trustees have no powers not expressed by statute, the power to sue and be sued imports authority to bind the town by a *bona fide* settlement of a controversy. *Petersburg v. Mappin*, 14 Ill. 193; 56 Am. Dec. 501.

A town ordinance providing that, "If any person shall drive any horse furiously in any street . . . he shall forfeit," etc., was held to import only a voluntary driving; and an instruction ignoring the intent of the accused, was held erroneous. *Morton v. Princeton*, 18 Ill. 383. Where, under the state law, the minimum penalty for a breach of the peace was three dollars, a town ordinance fixing it at five dollars, was held unauthorized by a charter prescribing punishment as provided by law for like offenses against the laws of the state. *Petersburg v. Metzker*, 21 Ill. 205.

For requisites of enactment and publication of town ordinances, see *Elizabethtown v. Lefler*, 23 Ill. 90; *Barnett v. Newark*, 28 Ill. 62. An ordinance punishing as a nuisance the allowing of swine to run at large, was held valid. *Roberts v. Ogle*, 30 Ill. 459; 83 Am. Dec. 201; otherwise, one forbidding the establishment of a cemetery in a property locality. *Lake View v. Letz*, 44 Ill. 81.

Under the authority to control and license water-craft, a village may require owners of boats to obtain a license before letting them for hire. Exacting a license fee therefor of \$5 per annum is not unreasonable. *Poyer v. Desplaines*, 22 Ill. App. 576.

A prosecution for violating an ordinance prohibiting the letting of grounds for picnics, without compensation, is not maintainable on evidence of the reservation of a right to sell refreshments, without also proving that

the right was exercised. *Poyer v. Desplaines*, 22 Ill. App. 584.

A village ordinance declaring "all public picnics and open-air dances" within its limits, to be nuisances, was held void. *Poyer v. Desplaines*, 18 Ill. App. 225.

A village empowered to pass "all necessary police ordinances," may ordain the closing of places of business on Sunday; and this, though the general law forbids only such labor on Sunday as disturbs the peace and good order of society. *McPherson v. Chebanse*, 114 Ill. 46; 55 Am. Rep. 857.

All municipal ordinances must bear equally on all inhabitants. Slaughtering, distilling, or soap-making cannot be interdicted in one locality, and permitted in another, or by a particular firm. *Tugman v. Chicago*, 78 Ill. 405, citing *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196; *Hudson v. Thorne*, 7 Paige (N. Y.) 261.

As to the admissibility of a pamphlet in proof of a village ordinance, see *Raker v. Maquon*, 9 Ill. App. 155; *Bethalto v. Conley*, 9 Ill. App. 339.

Where a town charter limited to \$50 fine for violation of ordinances, an ordinance fixing a penalty at from \$20 to \$100, it was held void as to excess above \$50. *Greenfield v. Mook*, 12 Ill. App. 281.

Without express charter authority, a municipality cannot impose a penalty for the violation of an ordinance regulating intelligence offices. *Keim v. Chicago*, 46 Ill. App. 445.

An ordinance against book-making and pool-selling within the municipality, but not applying to the actual inclosure of a fair or race-track association during the meeting, etc., was held not to discriminate against persons. *Chicago v. Brownell*, 146 Ill. 64, citing *State v. Burgoerfer*, 107 Mo. 1.

Further, as to the requisites, validity, and construction of municipal ordinances, see *Parker v. Catholic Bishop*, 146 Ill. 158; *Wagner v. Rock Island*, 146 Ill. 139.

In *Indiana*, the powers and duties of the board of town trustees, under the act of 1885, are similar to those of such body in the *Dakotas* already mentioned. They are principally set forth in the nineteen sub-sections of *Indiana* Rev. Stat. (1888), § 3333. Compare the fifty-one sub-sections of section 3106, as to the powers of city councils. Moreover, they may authorize lot owners to inclose a portion of the street for orna-

mental purposes, but not for permanent structures; nor to reduce the street and sidewalks below the width of sixty feet, § 3334. They shall "have power to provide, by ordinance, reasonable regulations for the safe supply, distribution, and consumption of natural gas within the respective limits of such towns," and require the users to pay a reasonable license therefor, § 3106 f. As to highways, town trustees have the same powers and duties as township trustees, § 5090 j. Of the six duties of the township trustees, under the act of 1859 (besides those under the acts concerning schools, the poor, and as fence-viewers), the principal one is: "Fourth, to see to a proper application of all moneys belonging to the township for road, school, or other purposes, and perform all the duties heretofore required of the township trustee, clerk, and treasurer under the school acts," § 5993. The authorization in the act of 1852 for town trustees to purchase fire apparatus, imports power to pledge credit therein. *Second Nat. Bank v. Danville*, 60 Ind. 504.

An ordinance requiring the town marshal to kill unmuzzled dogs, was held a valid exercise of the police power. *Haller v. Sheridan*, 27 Ind. 494.

Town trustees cannot pass a valid ordinance, until the statutory filing of the certificate of their election. *Dinwiddie v. Rushville*, 37 Ind. 66.

A town ordinance imposing a fine for driving faster than an ordinary trot, was held valid. *Nealis v. Hayward*, 48 Ind. 19.

The *Indiana* Act of 1867, p. 220, having contravened the constitutional requirement as to the amendments, town trustees cannot pass a valid ordinance prohibiting sale of intoxicating liquors without a license. *Martinsville v. Frieze*, 33 Ind. 507; *Steinmetz v. Versailles*, 40 Ind. 249. Accordingly, money paid for such license under threats of fine and imprisonment, can be recovered back. *Princeton v. Vierling*, 40 Ind. 340.

Towns incorporated under the general law cannot, by ordinance, impound and sell animals found running at large. *Slessman v. Crozier*, 80 Ind. 487. A penalty for violating a town ordinance is not a "debt" within the constitutional inhibition of imprisonment for debt. *Hardenbrook v. Ligonier*, 95 Ind. 70.

An action to recover an ordinance penalty is controlled by the rules of the

civil practice. *Ridge v. Crawfordsville*, 4 Ind. App. 513.

The penalty for an engineer's violation of an ordinance regulating the speed of locomotives, may be recovered against the railway company. *Hammond v. New York, etc., R. Co.*, 5 Ind. App. 526.

An ordinance forbidding liquor-saloon keepers to obstruct by screens or colored glass, a view of the interior of the saloon, was held unreasonable and void. *Champer v. Greencastle* (Ind. 1893), 35 N. E. Rep. 14.

An ordinance leaving it to the uncontrolled discretion of the board of health and the common council to decide whether a permit be granted for the erection of any tannery, was held invalid. *Plymouth v. Schultheis* (Ind. 1893), 35 N. E. Rep. 12.

Further, as to ordinances, see *Lewisville Natural Gas Co. v. State* (Ind. 1893), 34 N. E. Rep. 702, *overruling* *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; *Woodruff v. Bowen* (Ind. 1893), 34 N. E. Rep. 1113.

In *Iowa*, as to the effect of state legislation upon a saloon ordinance, see *New Hampton v. Conroy*, 56 Iowa 499; *Clinton v. Grusendorf*, 80 Iowa 117.

As to the presumption that an ordinance establishing a street was for a public purpose, see *Strahan v. Malvern*, 77 Iowa 454; *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722. As to requisites for the enactment of an ordinance, see *Bayard v. Baker*, 76 Iowa 220.

Irregularity in the town's organization cannot be pleaded in a prosecution under an ordinance, *e. g.*, for keeping an unlicensed ball-alley. *Decoran v. Gillis*, 10 Iowa 234.

Without a previous vote of the electors, district township electors cannot purchase school apparatus. *Taylor v. Otter Creek Dist. Tp.*, 26 Iowa 281.

Under a power to "prevent riots, noise, disturbance," etc., and to "preserve peace and order," a town may enact an ordinance to arrest and punish persons found intoxicated. *Bloomfield v. Trimble*, 54 Iowa 399; 37 Am. Rep. 212.

In *Iowa*, an ordinance authorizing a lot owner to make a grass plot along a sidewalk, is held not to import that the council may not destroy it by a crossing at a street intersection. *Brown v. Barstow* (Iowa, 1893), 54 N.W. Rep. 241.

An ordinance interdicting the marching of processions or noise of instru-

ments in the streets, so as to frighten horses or obstruct travel, and declaring it to be a misdemeanor not to desist upon the order of the marshal, was held not to be unreasonable. *Chariton v. Fitzsimmons* (Iowa, 1893), 54 N. W. Rep. 146.

As to when an ordinance is within the authorization of *Iowa Code*, § 489, for the erection of electric light plants, see *Hanson v. Hunter* (Iowa, 1892), 53 N. W. Rep. 84.

A town council, after authorizing a property owner to erect a scale in a street, is estopped to revoke the license until the public interests require its removal. *Spencer v. Andrew*, 82 Iowa 14.

As to the validity of ordinances regulating the hours of closing liquor saloons, see *Clinton v. Grusendorf*, 80 Iowa 117, citing *New Hampton v. Conroy*, 56 Iowa 499.

In *Kansas*, the township trustee contracts for the building of bridges; divides the township into road districts; fills vacancies in the office of road overseer; removes highway obstructions; prosecutes violations of the road laws; constructs drains; applies the township's moneys; has the care of its property; acts with the county board in levying an annual tax; as township assessor, enrolls soldiers employed in the late war, their widows and children; is judge of elections; is overseer of the poor; and constitutes, with the clerk and treasurer, an auditing board, with power also to issue licenses for billiards, etc.

Parol evidence is admissible to supplement the record of the acts and proceedings of a township board. *Rock Creek Tp. v. Coddling*, 42 Kan. 649.

As to when notice to, or presence of all, the members is essential to a valid special meeting of the town council, compare *Atchison v. De Kay*, 148 U. S. 591; *Paola, etc., R. Co. v. Anderson County*, 16 Kan. 302; *Aikman v. School Dist. No. 16*, 27 Kan. 129.

As to municipal ordinances, see *McCort* (Kan. 1893), 34 Pac. Rep. 456.

In *Kentucky*, the trustees make necessary regulations for the government of the town; cause the streets to be kept in order; levy taxes under certain restrictions; are a body corporate, suing and being sued, and appointing a necessary attorney, may purchase and hold land, not exceeding forty acres, for a cemetery; may tax any show or bowling alley within a quarter of a mile of the town limits; license the

keeping of stallions; and must annually post up a statement of the doings of the board, the receipts, disbursements, etc. *Kentucky Gen. Stat.* (1887), p. 1239 *et seq.* As to towns licensing billiard tables, see p. 1051 *et seq.* As to discharging firearms, see p. 459. As to counties licensing liquor-selling, nine-pin alleys, pawnbrokers and circuses, see p. 1047 *et seq.*

The general revenue law has not repealed the special statutes authorizing towns to license liquor-selling. *Adams v. Stephens*, 88 Ky. 443. A city or town may require a license of plumbers, but cannot delegate to a water company the power of determining who shall make the connections, etc. *Franke v. Paducah Water Supply Co.*, 88 Ky. 467. Compare, as to delegating to an engineer, etc., *Nevin v. Roach*, 86 Ky. 492.

A by-law subjecting to sale hogs found running at large, the owner to have only the balance of the proceeds, after deducting costs and charges, was held constitutional. *McKee v. McKee*, 8 B. Mon. (Ky.) 461.

In *Louisiana*, notwithstanding a general statute thereon, the legislature may delegate to a municipality power to adopt and enforce ordinances of special local importance; *e. g.*, as to the adulteration of milk. *State v. Fourcade* (La. 1893), 13 So. Rep. 187.

As to the power of a municipal council to reject bids, see *Gunning Gravel Co. v. New Orleans* (La. 1893), 13 So. Rep. 182.

An order to maintain the cleanliness of market places, was held not unreasonable. *State v. Dubarry* (La. 1893), 14 So. Rep. 208.

A charter provision for punishing the violation of municipal ordinances was held to apply to an ordinance prohibiting the obstruction of streets and alleys. *State v. Lochte* (La. 1893), 14 So. Rep. 215.

An ordinance prohibiting sales of lottery tickets, was held constitutional. *State v. Dobard* (La. 1893), 14 So. Rep. 253.

An ordinance requiring a labor agent to give bond, and answer in damages to anyone injured by his failure to discharge a duty, was held unconstitutional. *State v. Sachs* (La. 1893), 14 So. Rep. 249.

A statute prohibiting the contracting of any debt, without providing in the ordinance creating it the means of paying it, was held not contravened

by an ordinance directing work not necessitating the giving out of obligations beyond what the current revenues of the town may meet. *Reynolds v. Shreveport*, 13 La. Ann. 426.

An ordinance without express charter authorization for appointing inspectors of steam boilers and prescribing penalties, was held void. *State v. Robertson* (La. 1893), 13 So. Rep. 164.

In *Maine*, the selectmen have *pro tempore* power as moderators of town meetings. *Maine Rev. Stat.* (1883), pp. 79 and 97. They act as fence-viewers when others are not chosen, p. 81; cause town lines to be perambulated quinquennially, p. 88; inspect naturalization papers, and prepare vote lists, p. 95; act as assessors if none are chosen, p. 147; cause guide-posts to be erected, p. 259; appoint weighers, measurers, and sealers, pp. 353, 356, 394; and appoint overseers of houses of correction, p. 976.

The statutory provision for making quarantine regulations does not empower a town board of health to appropriate a vessel to hospital purposes. *Mitchell v. Rockland*, 41 Me. 363; 45 Me. 496; 52 Me. 118; 66 Am. Dec. 252.

The selectmen cannot pay over money in obedience to an illegal vote of the town. *Hooper v. Emery*, 14 Me. 375.

The selectmen can defend pauper suits without a special vote of authorization. *Industry v. Starks*, 65 Me. 167.

Selectmen may draw a negotiable order on the town treasurer in payment of a town debt. *Willey v. Greenfield*, 30 Me. 452.

Further, as to powers of selectmen, see *Bethum v. Turner*, 1 Me. 111; 10 Am. Dec. 36; *Mussey v. White*, 3 Me. 290; *Pease v. Cornish*, 19 Me. 191; *Harlow v. Young*, 37 Me. 88; *Frankfort v. Waldo County*, 40 Me. 389; *Kidder v. Knox*, 48 Me. 551.

As to the liabilities of the selectmen for their acts in *Maine*, see *infra*, this title, *Officers—Liabilities*.

In *Maryland*, the county being the chief political unit, the county commissioners are made the principal executive board for police and sanitary purposes, in the absence of special charter provisions otherwise. *Maryland Gen. Pub. Laws* (1888), p. 404, *et seq.*

Even after a street railway company has laid a track, the ordinance granting the right may be repealed, and the grant revoked; and this, without compensation, if on notice prior to the lay-

ing. *Lake Roland El. R. Co. v. Baltimore* (Md. 1893), 26 Atl. Rep. 510.

In *Massachusetts*, "the board of health of a town shall make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth, and causes of sickness within the town, or on board of vessels within the harbor of such town, and respecting articles which are capable of containing or conveying infection or contagion, or of creating sickness. . . . Whoever violates any such regulation shall forfeit a sum not exceeding \$100." The board may examine into such nuisances, causes, etc., and destroy them; order the owner or occupant to remove them, under penalty of \$20 for each day of willful neglect; make compulsory examination of premises; on hearing, etc., abate nuisance of wet, rotten, or spongy lands, where an infected person cannot be removed, cause the neighbors to be removed; and obtain a justice's warrant to secure infected articles or break open a house, etc. *Massachusetts Pub. Stat.* (1882), p. 436 *et seq.*

The board cannot take possession of a dwelling-house and appropriate it as a small-pox hospital. *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334. As to requisites of the notice to remove a nuisance, see *Com. v. Alden*, 143 Mass. 113. As to the powers of the board, see *Conway v. Russell*, 151 Mass. 581; *Quincy v. Kennard*, 151 Mass. 563.

The selectmen act as assessors, overseers of the poor, and a board of health, in the absence of election thereof. *Massachusetts Pub. Stat.* (1882), p. 237. They prepare the lists for the drawing of jurors, p. 994; remove a disabled tax collector, p. 127, and take charge of uncollected tax lists, p. 128; appoint, upon vacancy, a collector, highway surveyor, fence-viewer and field driver, p. 236; appoint fire-wards and fire-enginemens, p. 265; audit expenses of fire inquests, p. 1209; make annual returns to the insurance commissioner, p. 265; establish a fire department, p. 267; call town meetings for establishing fire districts, p. 269; appoint harbor masters, p. 411; appoint fish wardens and enforce fish laws, p. 505; measure ponds in regulation of inland fisheries, p. 500; enforce lobster laws, p. 507; also oyster laws, p. 508; also game laws, p. 511; execute a call of the militia, p. 150; appoint lock-up keepers, p. 230; appoint commissioners to try complaints against girls, p.

488; advise as to the sentence of boys to the reform school, p. 490; restrain peddling by minors, p. 405; apply to the probate court to appoint a guardian of a minor, p. 783; cause the probate court to appoint a guardian of an insane person or spendthrift, p. 784; appoint complainants as to neglected children, p. 320; provide for binding out apprentices, p. 827; regulate educational exhibitions of children, p. 318; appoint probation officers, p. 1193; appoint police officers, p. 236; compel attendance of witnesses, p. 986; provide for armories, p. 162; disburse state aid, p. 248; establish watch districts, p. 262; hear, etc., as to railroad routes, p. 607; offer rewards for apprehension of offenders, p. 1186; direct carriers' sales of unclaimed articles, p. 515; appoint inspectors, weighers and measurers, p. 377 *et seq.*; regulate trotting parks, p. 1178; arrange for water supply, p. 229; provide for laying aqueducts, p. 592; lay sewers, p. 340; petition for lowland roads and drains, p. 1085; enforce vaccination, p. 443; establish drinking troughs, p. 232; regulate as to slaughter houses and other offensive trades, p. 447; regulate the laying of gas pipes, p. 583; erect guide posts, p. 352; authorize the erection of telegraphs and make regulations therefor, p. 231; remove highway incumbrances, p. 356; regulate passage of vehicles and sleds, p. 353; abate unsafe structures, p. 360; abate gaming booths, p. 538; license the moving of buildings in highways, p. 353; also veteran parades, p. 167; also fireworks and other explosives, p. 546; also theatricals, p. 555; also billiards and bowling alleys, p. 554; also liquor-selling, p. 524; also inn-holders and victualers, p. 540; also lying-in hospitals, p. 443; also pawn-brokers, p. 543; also intelligence offices, p. 532; also auctioneers, p. 404; cause unlicensed dogs to be killed, p. 551; and provide against contagious diseases among animals, p. 494.

A proceeding before the county commissioners on a petition to lay out a highway, was held to be a "suit" within a by-law authorizing the selectmen to defend suits against the town. *Hyde Park v. Norfolk County*, 157 Mass. 94.

As to the liability of selectmen for their acts in *Massachusetts*, see *infra*, this title, *Officers—Liability*.

A majority of the selectmen may lay out a town way. *Dartmouth v. Bristol County*, 153 Mass. 12.

As to the authority of the selectmen to represent the town at a hearing on petition to the county board for laying out a highway, see *Hyde Park v. Wiggin*, 157 Mass. 94.

The wrongful laying out of a sewer through private land does not invalidate the whole lay-out. *Com. v. Abbott* (Mass. 1894), 35 N. E. Rep. 782.

Upon a town vote to sell land, the next year's board of selectmen cannot execute a deed. *Littlefield v. Boston, etc., R. Co.*, 146 Mass. 268.

A town's vote to appropriate a certain sum for highways does not empower the selectmen to contract for the construction of a way ordered by the county commissioners, nor to pledge the town's credit therefor. *Bean v. Hyde Park*, 143 Mass. 245.

A town vote authorizing selectmen to settle a claim "at their discretion," was held to empower them to submit it to arbitration. *Campbell v. Upton*, 113 Mass. 67.

A town's election of fire-wards, was held not to affect the selectmen's general statutory duty to establish a fire-department. *Long v. Sargent*, 101 Mass. 117.

The *Massachusetts* statute authorizing selectmen to offer a reward for securing a person "charged with crime," means only a charge by complaint or indictment. *Day v. Otis*, 8 Allen (Mass.) 477.

Selectmen have no authority *ex officio* to hire a building for the town meetings. *Goff v. Rehoboth*, 12 Met. (Mass.) 26.

Further, as to the powers of selectmen, see *Clark v. Cushman*, 5 Mass. 505; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Anthony v. Adams*, 1 Met. (Mass.) 384; *Blanchard v. Stearns*, 5 Met. (Mass.) 298; *Mears v. Boston, etc., R. Co.*, 5 Gray (Mass.) 371; *Smith v. Cheshire*, 13 Gray (Mass.) 318; *Lombard v. Oliver*, 3 Allen (Mass.) 1; *Rowe v. Edmands*, 3 Allen (Mass.) 334; *Belcher v. Farrar*, 8 Allen (Mass.) 325; *Washington v. Eames*, 8 Allen (Mass.) 432; *Palmer v. Haverhill*, 98 Mass. 487.

An ordinance prohibiting blasting without the consent of the municipal board, was held valid. *Com. v. Parks*, 155 Mass. 531.

The reasonableness of a municipal by-law or sanitary ordinance, *e. g.*, forbidding an abutter to allow filth to remain in a passageway, but not specifying the time, is not to be tested by its application to extreme cases. *Com. v. Cutter*, 156 Mass. 52.

An ordinance may forbid selling in the streets without a permit, although the party complained of has a license as peddler, from the commonwealth. *Com. v. Ellis*, 158 Mass. 555.

In *Michigan*, "The supervisor, the two justices of the peace whose term of office will soonest expire, and the township clerk, shall constitute the township board." *Michigan Gen. Stat.* (1882), § 744. It audits all claims against the township, § 746; settles with the other officers, protects the records, and determines as to the clerk's bond, § 747; raises money for town purposes when the town meeting has neglected to do so, § 750; appoints a board of review of assessments, pp. 1270, 1293; directs in the planting of shade trees, § 1408; acts as board of health, § 1633; purchases and holds in trust burial grounds, §§ 1637-8; appoints commissioners to protect fruit trees, § 2226; approves liquor bonds, § 2278, and druggists' bonds, § 2282; levies the tax to pay railroad-aid bonds, §§ 3452-3; and may for cause, on five days' notice, remove a district officer or school inspector, § 5170. As to the restricted power of the board to vote money for township expenses, see *Harding v. Bader*, 75 Mich. 316. In case of a vacancy on the board, the members may call a justice of the peace to act temporarily. *Grondin v. Logan*, 88 Mich. 247. As to requisites of valid action of the board, see *Newaygo County Mfg. Co. v. Echinaw*, 81 Mich. 416; *Auditor Gen'l v. McArthur*, 87 Mich. 457. As to organization of town agricultural or horticultural boards, see *Michigan Gen. Stat.* (1882), § 2303. No meeting of a township board is legal, unless duly called or notified, or else attended by all its members. *Beaver Creek Tp. Board v. Hastings*, 52 Mich. 528. Where a village charter provides for selling animals, partly as a penalty for their running at large, and partly for expenses of impounding, the penalty is severable and can be omitted. *Grover v. Huckins*, 26 Mich. 476. In licensing liquor-selling, accepting the dealer's bond, etc., a village has no discretion beyond the power conferred by the statute; *e. g.*, it cannot reject the bond merely because the principal is a married woman. *Amperse v. Kalamazoo*, 59 Mich. 78. A resolution of council assuming to empower an electric light company to use the poles of another company without regulating

the manner of stringing the wires, was held unreasonable and void. *Citizens' Electric Light, etc., Co. v. Sands*, 95 Mich. 551. An ordinance making indecent exposure an offense, without reference to the intent, was held to be a valid exercise of the police power. *Grand Rapids v. Bateman*, 93 Mich. 135. An ordinance or resolution fixing a salary, was held to be, within a charter requirement of a majority vote, an appropriation of money. *Fournier v. West Bay City*, 94 Mich. 463.

In *Minnesota*, the town supervisors may issue coupon bonds of the town. *Minnesota Gen. Stat.* (1891), § 1137. A village charter authorizing the council by ordinance "to prevent riots, noise," etc., "and generally to promote and preserve good order," etc., was held to import power to ordain against assault and battery only when committed publicly. *State v. Bruckhauser*, 26 Minn. 301. An ordinance requiring saloons to be kept closed on Sunday, was held not unreasonable. *State v. Harris*, 50 Minn. 128. Charter authority to contract for a water supply, was held not to empower to grant an exclusive franchise disabling the municipality for thirty years from establishing its own water-works. *Long v. Duluth*, 49 Minn. 280. An ordinance provision that a building inspector shall be a practical architect and sanitary engineer, was held to be mandatory. *State v. Starky*, 49 Minn. 503. A stock clock was held to be within a municipal charter authorizing the prohibition of any "gambling device." *State v. Grimes*, 49 Minn. 443. As to the power of a park board under *Minnesota Special Laws* (1883), ch. 281, to exclude vehicles from the parks, see *State v. Waddell*, 49 Minn. 500. A store was held not to be a "junk shop," within the meaning of a license ordinance, merely because it deals in second-hand furniture. *Duluth v. Bloom* (Minn. 1893), 56 N. W. Rep. 580.

In *Mississippi*, "The mayor and board of aldermen of every city, town and village shall have the care, management, and control of the city, town, or village, and its property and finances, and shall have power to enact ordinances, . . . ;" levy and collect taxes for general revenue purposes not to exceed six mills on the dollar in any one year, and for general improvements within the same limit; levy taxes to pay municipal bonds and coupons; make regulations as to nuisances and cognate

malsters; compel owners of property adjacent to walks and ways to erect safeguards, except when made dangerous by municipal authority; grant the right to erect telegraph, electric light or telephone poles and wires, but not exclusively; grant the right to lay gas, water, sewer, or steam pipes, or conduits for electric light; prescribe rules for weighing and measuring commodities, and for inspecting and condemning inflammable fluids not of standard quality; change water courses, under certain restrictions as to cost, etc.; approve maps of subdivision; compel certain males to work streets; exercise the right of eminent domain as to streets, etc.; erect and operate water-works and prescribe water rates; make quarantine laws and enforce them within five miles of the corporate limits; to suppress dram shops and club rooms; restrain and prohibit slaughter houses, disreputable houses, gambling rooms, "desecration of the Sabbath-day, and all kinds of indecency and other disorderly practices, disturbance of the peace, and to provide for the punishment of the persons engaged therein;" provide necessary municipal buildings; construct needful harbor improvements, guide river currents, regulate public wharves, and collect levee rates; erect a municipal prison, and regulate the keeping of the prisoners; "aid and encourage the establishment of manufactories, gas works, water-works, and other enterprises of public utility, other than railroads, within the corporate limits, by exempting all property used for such purposes from municipal taxation for a period not longer than ten years;" pass all ordinances, and enforce the same by fine not exceeding \$100, or imprisonment not exceeding thirty days, or both. *Mississippi Code* (1892), § 2925 *et seq.* Moreover, cities and towns in that state have certain powers that are not conferred on villages; *e. g.*, to license ferries; fix carriage rates; adopt measures to protect strangers; erect and govern hospitals, work-houses and houses of correction; maintain police; provide for lighting streets and public grounds; maintain public libraries; regulate public halls as to ingress and egress; provide for the prevention and extinguishment of fires; prohibit the erection of wooden buildings within certain limits; regulate and prevent dangerous or noxious manufactories and the storing of green hides; regulate the storage of powder, cotton, and

all other combustible and inflammable materials; regulate construction of chimneys, boilers, ash-deposits, with right to enter buildings therefor; and, on vote of the qualified electors, keep in repair the highways within three miles from the corporate limits. § 2958. Cities and towns having more than 1,000 inhabitants may impose a license-tax on all callings, etc., pursued within their limits, "the same not to exceed fifty per centum of the state license-tax levied upon the same callings, trades, and professions;" may regulate street railways and crossings; prevent the running at large of animals; destroy dogs running at large; and, on vote of the qualified electors, establish landings and free wharves on navigable streams within five miles of the corporate limits, § 2971 *et seq.*

An ordinance prohibiting the retailing of fresh meats from four o'clock p. m. to nine a. m., was held valid. *Porter v. Water Valley*, 70 Miss. 560.

The courts will not take judicial notice of the existence of a town ordinance. *Naul v. McComb*, 70 Miss. 699.

An ordinance prohibiting the placing of rubbish on sidewalks, not mentioning barrels, although specifying iron hoops and nails, is not violated by allowing barrels containing rubbish to remain on the sidewalk. *Giardina v. Greenville*, 70 Miss. 896.

An ordinance of a town, declaring it unlawful to bring therein or offer for sale second-hand clothing, without first having produced satisfactory proof to the mayor that such clothing did not come from a locality where contagion prevailed, was held to be void; it being an unjust and unreasonable restraint of trade. *Kosciusko v. Slomberg*, 68 Miss. 469. But compare *Soon Hing v. Crowley*, 113 U. S. 703.

In *Missouri*, as to the duties of the township board of directors, see *Missouri Rev. Stat.* (1889), § 8473.

An ordinance providing for advertisement for bids on a paving contract, by posting the notices at ten public places for five days, was held not unreasonable. *Warren v. Barber Asphalt Paving Co.*, 115 Mo. 572.

Charter authority to impose a fine for letting live stock run at large, was held not to sustain an ordinance authorizing sale upon non-payment of certain charges. *Johnson v. Daw*, 53 Mo. App. 372.

An ordinance fixing the maximum load of a two-horse team and wagon,

and affixing a penalty for excess, was held not void for partiality. *Kansas City v. Sutton*, 52 Mo. App. 398.

An ordinance passed by legislative officers *de facto* under color of right, is not assailable collaterally by private parties. *Perkins v. Fielding* (Mo. 1893), 24 S. W. Rep. 444.

In actions for violating a town's ordinances, its corporate capacity cannot be questioned; this can be done only by the state, by *quo warranto*, or other direct proceeding. *Fredericktown v. Fox*, 84 Mo. 59.

An ordinance may prescribe the manner in which a common-law obligation shall be discharged; *e. g.*, that one excavating in a street, shall erect a fence three feet high as a safeguard. *Jelly v. Pieper*, 44 Mo. App. 380. A municipality has no authority to ordain that a street car "shall be stopped in the shortest time and space possible," *Fath v. Tower Grove, etc.*, R. Co., 39 Mo. App. 447; nor that a railway train be run not faster than four miles an hour. *White v. St. Louis, etc.*, R. Co., 44 Mo. App. 540, *citing* against municipal favoritism or prejudice, the slaughter-house case, *Tugman v. Chicago*, 78 Ill. 405; the case of an invalid ordinance inhibiting auction sales after sundown, *Hayes v. Appleton*, 24 Wis. 542; and the gas-pipe case, *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318. An ordinance granting a right to a gas company and its successors was held not to be void for extending the term thereof beyond the company's own term of existence. *State v. Laclede Gaslight Co.*, 102 Mo. 472.

An ordinance imposing the cost of a street grading both on abutting and other property, was held to be invalid. *Halpin v. Campbell*, 71 Mo. 493. An ordinance authorizing the construction of a sidewalk in an isolated portion of a municipality, was held to be unreasonable and invalid. *Corrigan v. Gage*, 68 Mo. 541, *citing* the meat-shop case, *St. Louis v. Weber*, 44 Mo. 547.

The courts will not consider the question of the unreasonableness or oppressiveness of an ordinance passed in pursuance of an express legislative grant. *Kansas City v. Richards*, 34 Mo. App. 521.

An ordinance allowing a railroad company to run a track over streets in prosecuting its private business, was held to be unlawful. *Glaessner v.*

Anheuser-Busch Brewing Assoc., 100 Mo. 508.

An ordinance prohibiting the sale of skimmed milk was sustained. *Kansas City v. Cook*, 38 Mo. App. 660.

In *Nebraska*, an ordinance was held not to be unreasonable for interdicting seats in drinking saloons. *Brown v. Lutz*, 36 Neb. 527.

Where seventeen members of the county board were present, and eight voted in favor of changing the boundaries of a township, seven against it, and two did not vote, it was held sufficient to authorize the change; *Nebraska Const. Stat.*, § 912, requiring "the votes of a majority of the supervisors present." *Inavale Tp. v. Bailey*, 35 Neb. 453.

In *Nevada*, towns and cities are chiefly governed by the board of county commissioners; *e. g.*, as to boundaries, tax-leaves, streets, fire department, nuisances, licenses, ordinances, prevention and punishment of disorderly conduct, establishing a board of health, auditing claims, managing municipal property, condemning and appropriating, etc. *Nevada Gen. Stat.* (1885), § 2024. As to work on streets upon contract under sealed bids, duty of the county commissioners, etc., see § 441.

Charter authority to make necessary contracts, and to make all necessary provision for the maintenance of the indigent and for medical attendance upon them, was held not to import power to furnish medical attendance to municipal officers who are not indigent. *Tucker v. Virginia City*, 4 Nev. 20.

In *New Hampshire*, a municipal board cannot delegate authority conferred by statute; *e. g.*, the laying out of a turn-out in a horse railroad. *Concord v. Concord Horse R. Co.*, 65 N. H. 30. A town holds the volumes of the state statutes and reports for the information of its inhabitants; and it may reclaim them from a lawyer who has contracted with the selectmen for their use. *Litchfield v. Parker*, 64 N. H. 443.

As to the liability of selectmen for their acts in *New Hampshire*, see *infra*, this title, *Officers—Liabilities*. As to their powers and duties, see *New Hampshire Pub. Stat.* (1891), p. 151.

Selectmen cannot, *ex officio*, act as town liquor agents. *Richards v. Columbia*, 55 N. H. 96.

The selectmen can, without special authorization, institute suits to recover back illegal interest paid by the town. *Albany v. Abbott*, 61 N. H. 157.

The selectmen cannot inquire into the legality of a school district's vote to raise money; *mandamus* lies to compel them to assess the tax voted. School District No. 6 v. Carr, 63 N. H. 201.

The selectmen are themselves the health officers, until they have appointed others. Bedford v. Rice, 58 N. H. 446.

They have not general authority to bind the town by contract. Andover v. Grafton, 7 N. H. 298.

In the absence of specific instructions, they have discretionary power to pay a town debt. Sanborn v. Deerfield, 2 N. H. 251.

Selectmen cannot, *ex officio*, release without consideration, a cause of action against the town, nor release a witness liable over to the town in case of a judgment against the town. Such authority must be given by town votes. Carlton v. Bath, 22 N. H. 559.

A selectman cannot act for the town in making a loan of its money to himself. Holderness v. Baker, 44 N. H. 414.

Selectmen may omit to tax a resident, to prevent his gaining a settlement. Thompson v. Newtown, 21 N. H. 595.

Further, as to powers of selectmen, see Wason v. Severance, 2 N. H. 501; Hanover v. Eaton, 3 N. H. 38; Tolman v. Marlborough, 3 N. H. 57; Mason v. Bristol, 10 N. H. 36; Great Falls Bank v. Farmington, 41 N. H. 32; Backman v. Charlestown, 42 N. H. 125.

In *New Jersey*, as to the duty of "the board of chosen freeholders," see *infra*, this title, *Election or Appointment*. These township boards constitute for the county "a body politic and corporate in law," capable to hold real and personal estate in trust for the county, sue and be sued, etc., and raise money for county purposes. *New Jersey Revision* (1877), § 1 *et seq.*

The township committee is the legislative or governing body in the Taxation Act of 1884. Reid v. Wiley, 46 N. J. L. 473. Where a legislative act confers on a township committee the supervision of persons authorized to interfere with a public road, the committee, and not the town, may bring suit on a bond exacted from such persons to perform the duty. Woodbridge Tp. v. Hall, 47 N. J. L. 388. A township committee cannot direct the collector not to collect a tax which, though illegal, has never been set

aside; and the committee would not be stopped to sue on his bond for his dereliction. Painter v. Blairstown, 43 N. J. Eq. 317. To support a water tax under the act of 1881, every part of the township need not be supplied with water. State v. Bloomfield, 47 N. J. L. 442. Where a statute authorized a township committee to drain certain lands, if they deemed it of public advantage, it was held that their resolution therefor, stating that they so deemed it, could not be contradicted by parol, after public money had been expended for the same. State v. Clinton, 39 N. J. L. 656. The duty of the township authorities as to highways, gives them such special interest beyond the public at large, as entitles them to maintain a bill in their own name to restrain the shutting up thereof. Greenwich v. Easton, etc., R. Co., 24 N. J. Eq. 217; 25 N. J. Eq. 565.

An ordinance requiring horse railway companies to have an agent, besides the driver, to help control the car and passengers, was held not unreasonable. State v. Trenton, 53 N. J. L. 132.

An ordinance prohibiting the digging up of the surface of a street, except by permission of the municipal board, was held unreasonable, as applied to a railway company's exercise of its franchise. Allen v. Jersey City, 53 N. J. L. 522.

As to the power of a municipal board to contract for lighting streets, see State v. Board of Street, etc., Com'rs (N. J. 1893), 26 Atl. Rep. 92. Street boundaries cannot be determined without allowing the abutting owners to be heard. Voorhees v. Bound Brook (N. J. 1893), 26 Atl. Rep. 710. Further, as to ordinances, see State v. Bayonne (N. J. 1893), 26 Atl. Rep. 81; State v. Elizabeth (N. J. 1893), 26 Atl. Rep. 939; State v. Rutherford (N. J. 1893), 26 Atl. Rep. 933; State v. National Docks R. Co. (N. J. 1893), 26 Atl. Rep. 145; State v. Vineland (N. J. 1893), 26 Atl. Rep. 149; State v. Egg Harbor City (N. J. 1893), 26 Atl. Rep. 89; Rutgers College Athletic Assoc. v. New Brunswick (N. J. 1893), 26 Atl. Rep. 87; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380; Paterson R. Co. v. Grundy (N. J. 1893), 26 Atl. Rep. 788; State v. Orange, 50 N. J. L. 389; State v. Ocean Grove Camp Assoc. (N. J. 1893), 26 Atl. Rep. 798.

Statutory authorization of an ordinance, providing for trial of certain

offenses by the mayor or "justices of the peace" of the town of Lambertville, was held not to authorize an ordinance providing for trial thereof before "either of the justices" of said town. *State v. Zeigler*, 32 N. J. L. 262.

In *New Mexico*, "the corporate authority of the incorporated towns, organized for general purposes, shall be vested in a board of trustees (*fidei comisarios*), consisting of one mayor, one recorder, and four other trustees, who shall be qualified electors residing within the limits," etc. *New Mexico Comp. L.* (1884), § 1686. For eighty-one specifications of the trustees' duties, see § 1622.

In *New York*, the town board may appoint fire companies. *New York Sess. L.* (1891), p. 477. As to the right of the board to appeal, regardless of the meeting's direction, see *Chase v. Defendorf*, 128 N. Y. 652; *Hulburt v. Defendorf*, 58 Hun (N. Y.) 585. As to the requisites of valid action of the board in auditing claims, see *Jackson v. Collins*, 16 N. Y. Supp. 651; 62 Hun (N. Y.) 618.

An ordinance of a board of health prohibiting all persons from passing from within a quarantine inclosure, contravening the authority of the state quarantine officer, was held invalid. *People v. Roff*, 3 Park Cr. Cas. (N. Y.) 216.

Charter authority to license "peddlers," was held to import power to compel milk dealers to take out a license. *People v. Mulholland*, 19 Hun (N. Y.) 548.

A municipal council's grant of a franchise for a street railway, without consideration, was set aside at the suit of a taxpayer, a third party's offer to pay a large sum having been refused. *Adamson v. Union R. Co.* (Supreme Ct.), 26 N. Y. Supp. 136.

A village ordinance was held invalid for not publishing when it was to take effect. *Watkins v. Hillerman* (Supreme Ct.), 26 N. Y. Supp. 252.

A village ordinance prohibiting the igniting of combustibles in streets, between the rising and the setting of the sun, was held valid. *New Rochelle v. Clark*, 65 Hun (N. Y.) 140.

Upon a tie, the presiding officer's vote was held to make a "majority vote" of a municipal council. *New York, etc., R. Co. v. Dunkirk*, 65 Hun (N. Y.) 494.

In *North Carolina*, every incorporated town may annually elect not

more than seven, nor less than three, commissioners to "be a body corporate, with succession during the corporate existence of the town." *North Carolina Code* (1883), § 3787. Also a mayor to preside at the meetings of the board, § 3794. They may levy taxes on polls, on liquor-retailing, on animals running at large, and on produce wagons; establish markets; appoint a weigher, a constable, patrol, and other necessary agents; pass laws for abating nuisances and preserving health; regulate as to bakers' bread; keep streets and bridges in repair; purchase land for cemeteries; and enforce their laws by penalties, § 3800 *et seq.* The route of a railroad cannot be altered after the grading is begun, unless the change be sanctioned by a vote of two-thirds of the corporate authorities of the town, etc., § 1953.

The act of 1877, ch. 141, deprived the board of township trustees of its existence as a municipal corporation, and it cannot be a party to a suit. *Wallace v. Sharon Tp.*, 84 N. Car. 164.

An ordinance punishing owners of beasts not penned, was held not to apply to non-residents of the town. *Plymouth v. Pettijohn*, 4 Dev. (N. Car.) 591. But compare *Whitfield v. Longest*, 6 Ired. (N. Car.) 268.

A town ordinance declaring certain riparian strips to be the property of the front lot owners respectively, was held not to give color of title; being not under seal nor expressing any consideration. *Beaufort Tp. v. Duncan*, 1 Jones (N. Car.) 239.

An ordinance forbidding anyone coming from an infected place to enter the town, was held to apply only to those persons who left the infected place after its passage, and came immediately to the town. *Salisbury v. Powe*, 6 Jones (N. Car.) 134.

A penalty for disorderly conduct, ranging from one dollar to twenty, was held to render a town ordinance void for uncertainty. *Louisburg v. Harris*, 7 Jones (N. Car.) 281.

A town ordinance for impounding and selling for the expenses, all hogs found running at large, whether of residents or non-residents, was held valid. *Rose v. Hardie*, 98 N. Car. 44.

A town ordinance prescribing as limits of penalty that one "shall be fined a sum not exceeding five dollars, and one dollar for each and every day he shall neglect to make such repairs," was held void for uncertainty. *State v. Rice*, 97

N. Car. 421. So, also, was held void one prescribing, as a penalty for assaulting or insulting an officer, that such person "shall forfeit and pay not more than fifty dollars or suffer imprisonment not to exceed one month." *State v. Crenshaw*, 94 N. Car. 877.

A town ordinance prohibiting liquor selling, was held void under the general state license law. *State v. Brittain*, 89 N. Car. 574.

A town ordinance punishing the selling of liquor on Sunday, must give way to the statute thereon. The town charter is subordinate to the general public law. *State v. Langston*, 88 N. Car. 692, citing 1 Dill. on Mun. Corp., § 302, and the market-house case, *Washington v. Hammond*, 76 N. Car. 33.

Further, as to regulating liquor selling, see *State v. Davis*, 111 N. Car. 729.

In *Ohio*, the board of civil township trustees divides the township into road districts; settles the accounts of the treasurer and supervisors; appropriates the road moneys; makes and enforces all necessary health regulations; procures lands for cemeteries, and makes and enforces regulations therefor; appoints trustees of the public library; and relieves the poor. *Ohio Rev. Stat.* (1890), § 1457 *et seq.* The board also notifies as to the election of justices, § 566, and of pike superintendents, § 4878, supervises militia drafts, § 3092; regulates as to partition fences, § 4242; establishes public ditches, § 4511; provides for county roads, § 4660; for extermination of Canada thistles, § 4732; for guide-boards, § 4734; for watering on highways, § 4736; and for extinguishment of dangerous prairie and forest fires, § 4750. The power of the trustees, under a devise, with trust "to manage as they think best for said poor," was held not to be limited by the act of 1865 to loans upon real estate security. *Scott v. Marion Tp.*, 39 Ohio St. 153. As to the discretion of the trustees under the Act of 1866, in the erection of a town hall, see *New London Tp. v. Miner*, 26 Ohio St. 452.

An ordinance requiring a license fee of \$25, to sell at auction goods imported therefor, was held unreasonable. *Sipe v. Murphy*, 49 Ohio St. 536, citing the case of the "Sample-seller's Ordinance," *Ex p. Frank*, 52 Cal. 606; *Brown v. Maryland*, 12 Wheat. (U. S.) 448.

As to the validity of an ordinance imposing a fine for a specific offense, greater than that prescribed by the gen-

eral statute—*e. g.*, liquor-selling, *Ohio Rev. Stat.* 1862—see *Alliance v. Joyce*, 49 Ohio St. 7.

An imprisonment sentence by the mayor of a village, under an ordinance after the *Ohio* law of 1856, not providing for trial by jury, was held illegal. *Thomas v. Ashland*, 12 Ohio St. 124.

A town cannot subject to ordinance stray animals of non-residents. *Marietta v. Fearing*, 4 Ohio 429.

In *Oklahoma*, the principal police and sanitary powers are in the town board of trustees. See the twenty-one specifications in *Oklahoma Stat.* (1890), § 686. As to ordinances, see *Stillwater v. Moor* (Okl. 1893), 33 Pac. Rep. 1024.

In *Pennsylvania*, the corporate powers of a township are exercised by the supervisors thereof. *Bright. Purd. Pennsylvania Dig. L.* (1885), p. 364.

In a business requiring deliberation, the township can be bound only by the action of a majority of the board in a regular meeting. Repairing a road is a mere ministerial matter, manageable by one of the two supervisors; otherwise, as to the contraction of a debt therefor. *Union Tp. v. Gibboney*, 94 Pa. St. 534. Or as to a contract with an attorney for a year, at a fixed sum. *Bohan v. Pittston Tp.*, 4 Kulp (Pa.) 234. One supervisor may open a road authorized by the quarter session. *Brodhead v. Township*, 2 Lehigh Val. L. R. (Pa.) 381. One may also, the others not dissenting, in a district divided and assigned, purchase stone, and bind the township thereby. *Shepard v. Township*, 4 Del. Co. Rep. (Pa.) 385. But one cannot bind the township to pay an enlistment bounty. *Bearce v. Township*, 27 W. N. C. (Pa.) 212. The supervisors, on finding that the town has no defense, may confess judgment against it. *Maneval v. Jackson Tp.*, 141 Pa. St. 426.

A municipal council may adopt an unauthorized act done for the public good, by one of the municipal officers, and may assume the debt thereby contracted. So held as to a direction to the chief engineer to purchase flues necessary for a fire-engine. *Silsby Mfg. Co. v. Allentown*, 153 Pa. St. 319.

An ordinance prohibiting peddling without a license, but exempting residents of the borough from its operation, was held invalid; it contravening the constitution of the *United States* and the interstate commerce act, *Sayre v. Phillips*, 148 Pa. St. 482; distinguishing *Warren v. Geer*, 117

Pa. St. 207; and Titusville v. Brennan, 143 Pa. St. 642.

An ordinance providing that a fire committee or engineer should not incur, for repairs between council meetings, a liability exceeding a certain sum, was held not to preclude the council from adopting the act of such agent in excess of the sum named. *Silsby Mfg. Co. v. Allentown*, 153 Pa. St. 319.

A resolution offering a reward for the conviction of incendiaries, is binding only during a reasonable time. Seventeen years after the date of the resolution (and ten years after the last proclamation thereunder) was held to be an unreasonable time. *Shaub v. Lancaster*, 156 Pa. St. 362.

As to the power of municipal councils to permit the operation of a street railway by electricity, see *Reeves v. Philadelphia Traction Co.*, 152 Pa. St. 153.

The discretion of municipal councils in putting a sewer into a street, was held conclusive. *Philadelphia v. Thomas*, 152 Pa. St. 494.

As to the construction of an ordinance prohibiting the placing of goods on sale on footways, see *Philadelphia v. Sheppard*, 158 Pa. St. 347. As to one on repair of street railway tracks and paving, see *McKeesport v. McKeesport Pass. R. Co.*, 158 Pa. St. 447. Compare *Trenton v. Trenton Pass. R. Co.* (N. J. 1893), 27 Atl. Rep. 483.

As to the construction of a municipal grant to a railway to occupy so much of a street "as may be necessary," see *Pennsylvania, etc., R. Co. v. Philadelphia, etc., R. Co.* (Pa. 1893), 27 Atl. Rep. 683.

In *Rhode Island*, "the town councils shall be courts of probate within their respective towns." *Rhode Island Pub. Stat.* (1882), p. 459. They may ordain all regulations "not repugnant to law, which they may deem necessary for the safety of their inhabitants, from fire, firearms, fireworks, explosion of gunpowder from the quantity of, or mode or place of storing the same; to prevent persons standing on any footwalk, doorstep or in any doorway, or riding," etc., thereon to the annoyance of persons in the vicinity; to regulate telegraph wires and their appurtenances; to prevent indecent exposure of bathers; "against breakers of the Sabbath; against habitual drunkenness; to regulate the speed of driving horses and cattle over bridges; respecting the purchase and sale of merchandise or com-

modities within their respective towns and cities; to protect burying grounds from trespassers;" and, generally, all other regulations for the well-ordering of the prudential affairs and police of their respective towns, not repugnant to the constitution, etc.; also to impose penalties for the violation thereof; also to regulate the construction of doors and entrances, etc., and the use of lecture halls, etc., for the public safety; also "the time of closing shops, saloons, and other places of resort in the evening;" also requiring provision of fire-escapes; also to appoint special constables and other officers, to enforce ordinances. They also hold lands and funds for burial purposes; and may grant the right to lay water-pipes in highways, p. 151 *et seq.* A town council may also remove a tax collector, p. 131; fill a vacancy in a school committee, p. 139; make truancy ordinances, p. 154; lay out highways, p. 160; assign to the surveyors divisions for repair of highways and bridges, p. 170; alter water-courses, p. 173; establish sidewalks and gradings, p. 75; maintain guide-posts, p. 179; authorize one landowner to construct a drain across another's land, p. 181; bind out poor children, p. 185; direct the sergeant to remove paupers to their proper town, p. 190; order away persons of bad fame, p. 191; send insane paupers to the state asylum, p. 204; abate nuisances and regulate places for slaughtering, for burials, for manufacture of deleterious articles, for keeping swine, and for vaults and cesspools, p. 210; appoint a health officer, and establish quarantine rules, p. 219; ordain against contagion among cattle, p. 222; appoint registers of births, marriages and deaths, also undertakers, p. 225; license victuallers, p. 228; and pawnbrokers, p. 247; appoint fire marshals, p. 251; regulate as to dogs and damages therefrom, p. 256; appoint bird constables, p. 260; in towns on the sea appoint wreckage commissioners, p. 275; remove illegally located windmills, p. 283; appoint oil inspectors, p. 314; and milk inspectors, p. 317; apply to the railroad commissioners to alter crossings, p. 410; require flagmen, p. 411; examine any suspected possessor of unclaimed estate, p. 493; elect trial justices, p. 519; make juror lists, p. 539; appoint tramp officers, p. 689; elect coroners, p. 707; supervise militia enrollments, p. 744; and provide armories, p. 753. They may prohibit burials in compact parts of the town. *Rhode*

Island Sess. Acts (1884), p. 169. They may appoint liquor commissioners. Sess. Acts (1889), p. 135. They may grant franchises for distributing water or electric lights. Sess. Acts (1891), p. 1.

A town council's contract for a lease cannot, after the lessee has complied with its terms, be ignored by a subsequent council. *Marden v. Champlin*, 17 R. I. 423.

In *South Carolina*, the intendant and wardens may tax plays and shows. *South Carolina* Gen. Stat. (1882), § 1756. The municipal authorities of all incorporated towns and villages are empowered to grant licenses to retail spirituous liquors, § 1736. As to the power of the county commissioners to issue township bonds in aid of railroads, see *South Carolina* Acts (1888), p. 12.

One's remedy against a town council assuming to try him for an alleged violation of an ordinance, is by a writ of prohibition; he cannot recover a fine paid, though the council had no jurisdiction. *McKee v. Anderson*, Rice (S. Car.) 24.

In *Tennessee*, under the act of 1879, inhibiting any municipality from suspending any general statute for running railroads, an ordinance forbidding the necessary blowing of a steam engine is a nullity. *Katzenberger v. Lawo*, 90 Tenn. 235, *distinguishing Indiana* Code (1881), § 2178; *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569; 36 Am. Rep. 188.

Charter authorization to pass ordinances necessary and proper to preserve the health and "comfort" of the town, was held not to import power to impose penalties for breaches of the peace. *Raleigh v. Dougherty*, 3 Humph. (Tenn.) 11; 39 Am. Dec. 149.

A by-law prohibiting the sale of intoxicating liquors without a town license, was held void, as contravening the statute allowing sales under a state license. *Robinson v. Franklin*, 1 Humph. (Tenn.) 156.

As to the power of municipal officers in advertising proposals, see *Public Ledger Co. v. Memphis* (Tenn. 1893), 23 S. W. Rep. 51.

In *Texas*, the board of aldermen of a town controls the streets and other public places, prevents or abates nuisances, establishes markets, "and may do whatever else may be necessary to give effect to the provisions of this chapter," as to taxes, ordinances, pre-

scribing fines, etc. *Texas* Rev. Civ. Stat. (1889), art. 521. The town authorities cooperate with the county commissioners' court in sanitary regulations, art. 4098 a.

An ordinance prohibiting the renting of private property to lewd women, was held unreasonable and void. *Miliken v. Weatherford Council*, 54 Tex. 388.

An ordinance imposing an annual occupation tax upon butchers' establishing private stalls for vending meats within the municipality, was held to contravene to constitutional inhibition against unequal taxation. *Hoeftling v. San Antonio*, 85 Tex. 228.

In *Utah*, the governing board is a president and four trustees, elected biennially. *Utah* Comp. L. (1888), § 1820. As to its powers and duties, see the nineteen specifications in section 1824, and amendments thereof. Sess. L. (1890), ch. 54.

In *Vermont*, the powers and duties of the board of selectmen are nearly as multifarious as those of this board in *Massachusetts*, already mentioned. "The selectmen shall have the general supervision of the concerns of the town, and shall cause duties required by law of towns, and not committed to the care of any particular officer, to be duly performed and executed." *Vermont* Rev. L. (1880), § 2692.

Under such statute, it was held by a majority of the court, that the board could not bind the town by a promise to repay to its tax collector the amount of taxes advanced by him, but illegally assessed. *Miles v. Albany*, 59 Vt. 79.

The selectmen cannot bind the town by an order to pay their own claims. *Davenport v. Johnson*, 49 Vt. 403.

Selectmen may, after their term has expired, acknowledge their previous lease of public lands. In their lease of a ministerial lot, the words, "as long as wood grows and water runs or as we the selectmen have a right to lease the same," were held to refer to the statutory limitations of the time. *Lemington v. Stevens*, 48 Vt. 38.

As to the power of the selectmen to appoint highway surveyors, see *Scott v. Mount Tabor*, 48 Vt. 391.

Under the statute requiring the selectmen to "take the most prudent measures," etc., they may procure inoculation, and the town may vote to defray the expense. *Hazen v. Strong*, 2 Vt. 427. Selectmen have no author-

ity *ex officio* to receive moneys of the town and give discharges therefor. *Middlebury v. Rood*, 7 Vt. 125; *Angel v. Pownal*, 3 Vt. 462.

The selectmen may submit to arbitration such claims as they have statutory power to audit and adjust; and the town will be bound by the award. *Dix v. Dommerston*, 19 Vt. 262.

The selectmen may employ counsel in a road case in which the town agent has employed none. *Burton v. Norwich*, 34 Vt. 345. They may settle a suit, though the town has appointed an agent to manage suits as he thinks best. *Cabot v. Britt*, 36 Vt. 349.

Further, as to powers of selectmen, see *Cummings v. Clark*, 15 Vt. 653; *Taft v. Pittsford*, 28 Vt. 286; *Tarbell v. Plymouth*, 39 Vt. 429; *Hartwell v. Newark*, 41 Vt. 337.

As to the liability of selectmen for their acts in *Vermont*, see *infra*, this title, *Officers—Liability*.

Charter authorization of a village to "regulate" victualling houses, was held impliedly to repeal the general law for the town selectmen to license such houses, and to empower the village to license with penalty, etc. *St. Johnsbury v. Thompson*, 59 Vt. 300; 59 Am. Rep. 731.

A municipality cannot impair its license to an electric light company that has expended money on the faith thereof. This imports a vested right not to be interfered with by another company. *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377.

In *Virginia*, the mayor and councilmen constitute the council. *Virginia Code* (1887), § 1021. "The word 'council' shall include any body or bodies authorized to make ordinances for the government of a city or town." Ordinances "must not be inconsistent with the constitution and laws of the *United States*, or of this state," § 5, pl. 15 and 16. Among the sanitary and police powers of the council, is that "to prevent the pollution of the water and injuries to the water-works, for which purpose their jurisdiction shall extend to a mile above the same; to provide for the regular building of houses in the town; to make regulations for the purpose of guarding against dangers from accidents from fire; and, on the petition of the owners of not less than two-thirds of the ground included in any square, to prohibit the erection in such square of any

building or of an addition to any building, more than ten feet high, unless the outer walls thereof be made of brick and mortar, or stone and mortar, and provide for the removal of any building or addition erected contrary to such prohibition," § 1038. In an ordinance as to fire limits and building materials, the inhibition, "no person shall erect any building," may apply to the adding of a story to a house. *Carroll v. Lynchburg*, 84 Va. 803.

An ordinance that no person shall open a street without a deposit of such a sum as the committee on streets shall deem sufficient, was held to be *ultra vires*. *Wheat v. Alexandria*, 88 Va. 742.

A municipal council cannot delegate to a committee the power to sell public property. *Beal v. Roanoke* (Va. 1893), 17 S. E. Rep. 738.

In *Washington*, the governing board consists of the mayor and a council of five members elected biennially. *Washington Gen. Stat.* (1891), §§ 662-3. As to the powers of the town council, see the sixteen specifications in § 673.

Where the complaint, under an ordinance punishing vagrancy, states facts that constitute the crime under the general statute defining vagrancy, the conviction will be sustained, although the municipality is not authorized to define the crime. *Spokane v. Williams*, 6 Wash. 376.

As to the validity of an ordinance for impounding cattle running at large, see *Wilson v. Beyers*, 5 Wash. 303.

As to the sufficiency of an ordinance for the purchasing of water-works, see *Seymour v. Tacoma*, 6 Wash. 138.

Further, as to ordinances, see *McBryde v. Montesano*, 7 Wash. 69; *Spokane v. Williams*, 6 Wash. 376; *Spokane v. Robison*, 6 Wash. 547; *Arnott v. Spokane*, 6 Wash. 442; *Spokane St. R. Co. v. Spokane Falls*, 6 Wash. 521; *Lewis v. Port Angeles*, 7 Wash. 190.

In *West Virginia*, the governing authority is a common council composed of the mayor, recorder, and at least five councilmen. *West Virginia Code* (1891), p. 424, § 13. As to the powers thereof, see the enumeration, p. 426, § 28; p. 435, § 9. See also *Moundsville v. Fountain*, 27 W. Va. 182; *Richards v. Clarksburg*, 30 W. Va. 491.

In *Wisconsin*, if the county has but one town, the town board of supervisors shall constitute the county board. This does not violate the constitutional requirement of uniformity of government.

Where a municipal charter commits the decision of a matter to the council, and is silent as to the mode of decision, it may be by resolution, and need not be by ordinance.

2. Meetings—Votes.—The requisites of notification and of the conduct of town meetings in the respective *New England* states are much alike.¹

Cathcart v. Comstock, 56 Wis. 590. As to the principal duties of the town board, see § 819. As a board of audit, see § 821. As a drainage board, see § 1364. As a board of health, see § 1411. As to liquor licenses, see § 1548.

A town board cannot discharge a judgment on the treasurer's bond, by allowing additional credits. *Butternut v. O'Malley*, 50 Wis. 329.

Publication of the penalty of violating a village ordinance is not required when imposed by a general statute. *Oak Grove v. Juneau*, 66 Wis. 534.

Charter authorization of a village to submit to a vote the raising of money "for an extraordinary or special purpose," was held to mean only a municipal purpose; not to aid in the construction of a railroad. *Perrin v. New London*, 67 Wis. 416.

As to the validity of an ordinance regulating street parades, see *State v. Dering*, 84 Wis. 585.

An ordinance granting rights to lay pipes in streets, was held properly revoked before the acceptance of the grant; and the village was enjoined from laying them. *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475.

A charter requirement that the municipality shall build and keep in repair the sidewalks, and the lot owners pay the cost, either in material or labor under supervision of the street commissioner, imports no authority to ordain that abutters shall keep in repair the respective portions. *Woodard v. Boscobel*, 84 Wis. 226.

In *Wyoming*, the town council consists of a mayor and four councilmen, elected annually. Vacancies are filled by the council. *Wyoming Rev. Stat.* (1887), § 458; Amendment, Sess. L. (1888), ch. 43, § 1. As to the powers thereof, see the seven specifications in § 7; also the twenty-nine specifications in *Wyoming Rev. Stat.* (1887), § 468; *Atchison v. DeKay*, 148 U. S. 591, citing *State v. Jersey City*, 27 N. J. L. 493; *State v. Passaic*, 44 N. J. L. 171; *Merchants' Union Barb Wire Co. v. Chicago*, etc., R. Co., 70 Iowa 105;

Sower v. Philadelphia, 35 Pa. St. 231; *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190; *First Municipality v. Cutting*, 4 La. Ann. 335; *Green Bay v. Brauns*, 50 Wis. 204.

But if the charter requires a thing to be done by ordinance, it cannot be done by a resolution. *Newman v. Emporia*, 32 Kan. 458.

1. Compare with the *Massachusetts* provisions immediately succeeding *Connecticut Gen. Stat.* (1888), § 31 *et seq.*; *Maine Rev. Stat.* (1883), p. 78; *New Hampshire Pub. Stat.* (1891), p. 146 *et seq.*; *Rhode Island Pub. Stat.* (1882), p. 106, § 12; *Vermont Rev. Laws* (1880), § 2684 *et seq.*

In *Massachusetts*, every male citizen twenty-one years old (except paupers, wards, and persons unable to read), residents within the commonwealth one year, and within the town six months next preceding the meeting, and having paid taxes within two years, may vote thereat on all town affairs; also "women duly qualified and assessed, may vote for members of school committees." "Every town meeting shall be held in pursuance of a warrant under the hands of the selectmen, directed to the constables, or to some other persons appointed by the selectmen for that purpose, who shall forthwith notify," etc. "The warrant shall express the time and place of the meeting and the subjects to be there acted upon; the selectmen shall insert therein all subjects which may, in writing, be requested of them by ten or more voters of the town, and nothing acted upon shall have a legal operation, unless the subject-matter thereof is contained in the warrant." *Massachusetts Pub. Stat.* (1882), p. 232.

In *Reed v. Acton*, 117 Mass. 390, the court, by Morton, J., said: "Articles in warrants must often be, from the nature of the case, general in their description of the subject-matter." And it was held therein that the warrant for a prior adjourned meeting may be referred to in authorization of action. Compare *Belfast*, etc., R. Co. v. *Brooks*, 60 Me. 568. An article, "to hear the report

of any committee heretofore chosen, and to pass any vote in relation to the same," was held sufficient to enable the meeting to vote sums recommended by a committee appointed at a former meeting, the warrant for which fully set forth the business to be brought before it. *Fuller v. Groton*, 11 Gray (Mass.) 340. *Compare Rand v. Wilder*, 11 Cush. (Mass.) 294. But an article, "to choose a committee, or to hear and act upon the report of any committee the town may think proper when assembled," was held not to authorize the choice of a committee to discontinue a portion of a town way, and set off the land to a private individual. *Wood v. Quincy*, 11 Cush. (Mass.) 487. An article "to see if the town will build a new schoolhouse in District Number Six," followed by a vote "that the selectmen be authorized to build a schoolhouse in District Number Six, if they think it necessary," was held to effect no legal location of the house. *Crosby v. Dracut*, 109 Mass. 206. An article "to see if the town will build a town-house, and raise and appropriate money for the same," was held to authorize a vote to build one from the materials of an old meeting-house given by resolution of its proprietors, and to appoint a committee to take it down, procure a site, and superintend the erection, and a vote to indemnify the committee against any claim of any proprietor of the meeting-house. *Hadsell v. Hancock*, 3 Gray (Mass.) 526. An article, "to take any necessary measures for the support of the families of those who," etc., was held to authorize a vote to pay a certain sum monthly to each citizen of the town who shall enlist in the military service. *Grover v. Pembroke*, 11 Allen (Mass.) 88. An article, "to see what action the town will take relative to collecting the tax on" certain land, "and pass any votes on the same subject that may be deemed proper," followed by a vote to refer the matter to the selectmen with full powers, was held not to authorize them to grant to the owner, in consideration of the tax being paid, permission to use the land for burial purposes. *Woodlawn Cemetery v. Everett*, 118 Mass. 354. The warrant need not name each item of town charges for which money is to be raised. *Westhampton v. Searle*, 127 Mass. 502. An article, "to elect all necessary town officers," and "to raise and appropriate such sums of money as may

be necessary to defray town charges," etc., was held to authorize a vote to invest the tax collector with all the powers which a town treasurer has when appointed collector of taxes. *Sherman v. Torrey*, 99 Mass. 472.

The moderator must cause smokers and liquor-holders to withdraw. *Massachusetts Pub. Stat.* (1882), p. 81, § 64.

A vote appropriating a certain sum "for highways," does not empower the selectmen to contract for the construction of a way ordered by the county commissioners, or to pledge the credit of the town therefor. *Bean v. Hyde Park* 143 Mass. 245. As to the power of the town under an article "to see if the town will discontinue any part of the road recently located from," etc., "or act anything thereon," see *Spaulding v. Nourse*, 143 Mass. 490; as to the effect of different articles for choice of town officers, and a clause, "all of said votes to be on one ballot," see *Com. v. Wentworth*, 145 Mass. 50.

A town may, before any rights of third parties have intervened, rescind a vote. *Withington v. Harvard*, 8 Cush. (Mass.) 68. *Compare Brown v. Winterport*, 79 Me. 305.

Omission to comply with the statute as to the use of the check-list, was held to invalidate an election of the selectmen, beyond remedy by adjourned meeting. *Atty. Gen'l v. Simonds*, 111 Mass. 256.

A town clerk's record of a town meeting, as amended by himself, cannot be controlled by parol evidence. *Halleck v. Boylston*, 117 Mass. 469.

At whose cost a town way was made, is irrelevant to the question of its convenience or necessity; hence a vote of approval was held not to be invalidated by the town's knowledge of individual contribution thereto. *Copeland v. Packard*, 16 Pick. (Mass.) 217.

In order to bind a town, by purchase made by a part of a committee, the authorization must be in explicit language. A vote to raise a sum "for the purpose of erecting a high-school building," was held not to import power to contract for land for the site. *Marsh v. Dedham*, 137 Mass. 235.

As to requisites for the amendment of an invalid town vote, see *Judd v. Thompson*, 125 Mass. 553.

A town vote of "liberty to erect a grist mill on," etc., "with the use of said stream," accepted by the grantee, he to keep the bridge and highway in repair, was construed not to be a grant

of land; the town's ownership not being proven. *Hadley v. Hadley Mfg. Co.*, 4 Gray (Mass.) 140.

The fact that after the votes for the town officers of Montague had been cast, but before the result was announced, the moderator and clerk resigned, was held not to terminate the authority of the tellers, and one appointed clerk by the selectmen to be a clerk *de facto*. *Atty. Gen'l v. Crocker*, 138 Mass. 214.

In *Maine*, the requirement as to the warrant, is similar to that of the *Massachusetts* statute. See *Maine Rev. Stat.* (1883), p. 78. The notice of the meeting need not mention a public statute authorizing the proposed vote; *e. g.*, in aid of a railroad. *Canton v. Smith*, 65 Me. 203. As to what is or is not an "unreasonable refusal" of the selectmen to call the meeting, see *Southard v. Bradford*, 53 Me. 389. A town by-law requiring three months' notice of the meeting, was held unreasonable and void. *Jones v. Sanford*, 66 Me. 585. The meeting must be at the place named in the warrant. *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517. A valid vote may be taken in the open air near the building at which the warrant called the meeting, upon a unanimous consent thereto, if the room be too crowded to take an accurate division vote within. *Brown v. Winterport*, 79 Me. 305. A call for a meeting "at" a schoolhouse, means within its walls. An action after a hasty out-door meeting adjourned to a store a mile distant, without notification left behind, was held invalid. *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517. For divers cases illustrating the rule that the warrant need notify of the subject-matter only with reasonable certainty, see *Belfast, etc., R. Co. v. Brooks*, 60 Me. 568; *Ford v. Clough*, 8 Me. 334; 23 Am. Dec. 513; *Davenport v. Hallowell*, 10 Me. 317; *State v. Beeman*, 35 Me. 242; *Canton v. Smith*, 65 Me. 203; *Brown v. Winterport*, 79 Me. 305. Action of a meeting was held void for want of a specific article in the warrant. *Cornish v. Pease*, 19 Me. 184; *Barker v. Dixmont*, 53 Me. 575. An article to raise money for certain purposes is not exhausted by a single vote raising a certain sum. *Farrar v. Perley*, 7 Me. 404. An article "to see if the town will pay D. a certain sum which was actually reimbursed to the town for his enlisting," was held not to

authorize a vote "to pay a compensation to D. of \$400 in satisfaction of services he claims to have rendered the town for enlisting," it appearing that the town had not received any reimbursement on that account. *Drisko v. Columbia*, 75 Me. 73. The return must show that the warrant was posted at proper places. *Brown v. Witham*, 51 Me. 29; *Clark v. Wardwell*, 55 Me. 61; *Hamilton v. Phippsburg*, 55 Me. 193; *Allen v. Archer*, 49 Me. 346; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *Tuttle v. Cary*, 7 Me. 426. It must show posting, not merely in a public, but in a "public and conspicuous" place. *Bearce v. Fossett*, 34 Me. 575. The return must show the sign manual of the constable—not a dictated signature. *Chapman v. Limerick*, 56 Me. 390. That the return bore date on the day of the meeting, was held not fatal. *Bucksport v. Spofford*, 12 Me. 487. As to the requisites of the statutory "two-thirds vote," see *Portland, etc., R. Co. v. Hartford*, 58 Me. 23; *Belfast, etc., R. Co. v. Unity*, 62 Me. 148; *Portland, etc., R. Co. v. Standish*, 65 Me. 63. A railroad-aid meeting under the statute requiring a two-thirds vote, may adjourn by a majority vote and the adjourned meeting be a continuance. *Canton v. Smith*, 65 Me. 203. A town vote ratifying a loan to the selectmen, cannot be rescinded at a subsequent meeting. *Brown v. Winterport*, 79 Me. 305. A vote to ratify the proceedings of a prior illegal meeting extends only to the adoption therein precisely indicated. *Hamilton v. Phippsburg*, 55 Me. 193. Proceedings of town meetings must be construed liberally. *Keller v. Savage*, 17 Me. 444. A town vote authorizing a sale, was held to import power to execute a deed. *Nobleboro v. Clark*, 68 Me. 87; 28 Am. Rep. 22.

In *New Hampshire*, the requirements as to the "warrant" are very similar to those of the *Maine* statute. See *New Hampshire Pub. Stat.* (1891), p. 146. Further, as to the requisites of definiteness therein, see *Pillsbury v. Danforth*, 56 N. H. 272.

A warning for a vote on passage of a by-law to restrain the speed of driving over bridges, was held substantially to comply with the statute thereon; any phraseology is sufficient that clearly indicates the object. *Lisbon v. Clark*, 18 N. H. 234.

Under an article, "to see if the town

will alter the boundaries of any of the school districts," two districts may be united. *Converse v. Porter*, 45 N. H. 395. But an article pertaining only to redistricting would not authorize a vote to abolish a school-district system. *Child v. Colburn*, 54 N. H. 71. Under an article to raise money for the annual expenditures, each sum and object need not be specified in the voting. *Tucker v. Aiken*, 7 N. H. 113. A vote to pay a bounty for future enlistments was held valid; but not valid, a vote "to pay those who have enlisted since the date of the warrant." *Shackford v. Newington*, 46 N. H. 415.

In the conduct, voting, etc., towns may adopt the general election laws for town meetings. *New Hampshire* Pub. Stat. (1891), p. 116. One's pecuniary interest in the subject-matter—*e. g.*, election of a town agent to manage a suit brought by the town against him—does not disqualify him from voting thereon. *Dorchester v. Youngman*, 60 N. H. 385.

A court may allow the record of a town meeting to be amended by the officer who made it, even after he has ceased to hold the office. *Gibson v. Bailey*, 9 N. H. 168; *Pierce v. Richardson*, 37 N. H. 306. Where only a few years have elapsed since the meeting was held, and it does not appear that the record thereof might not be amended if the truth would warrant it, the sufficiency of the posting and proceedings will not be presumed. *Davis v. Robertson*, 9 N. H. 524.

In *Rhode Island*, the provisions are somewhat similar to those of the *Massachusetts* statute. See *Rhode Island* Pub. Stat. (1882), p. 106. But notice by the clerk was held to be legal, in the absence of proof of a by-law, under *Rhode Island* Pub. Stat. (1882), ch. 35, § 9, prescribing other methods. *Marden v. Champlin*, 17 R. I. 423.

In *Connecticut*, also, the provisions are somewhat similar to those of the *Massachusetts* statute. See *Connecticut* Gen. Stat. (1888), § 31 *et seq.*

In the "warning" no technical nicety is required, *e. g.*, as between the synonyms, "citizen," "inhabitant," "domiciled resident," etc. *Bull v. Warren*, 36 Conn. 83. The clerk's record is *prima facie* evidence of due special warning. *Isbell v. New York*, etc., R. Co., 25 Conn. 556. Specific mention in the warning is required for passing a by-law for a special purpose; *e. g.*, to regulate shell fishery.

Hayden v. Noyes, 5 Conn. 391. As to the burden of proof of due warning, see *Treat v. Middletown*, 8 Conn. 243. As to inadequate time of posting, and the validation of a note thereupon taken from military bounties by the *Connecticut* Act of 1864, see *Stuart v. Warren*, 37 Conn. 228.

The legislature can confirm an unauthorized vote of a town for military enlistment bounties. *Booth v. Woodbury*, 32 Conn. 118. An injunction collusively obtained was held not to preclude a town from ratifying a bounty vote. *Waldo v. Portland*, 33 Conn. 363.

An oral promise in a town meeting by the father and surety of a tax collector that had lost his rate-bill, to pay the expense of any litigation necessary in collecting a new one, if the town would make one out, is held void, being a promise to answer for another's default. *Pratt's Appeal*, 41 Conn. 191.

In *Vermont*, also, the provisions are somewhat similar to those of the *Massachusetts* statute. See *Vermont* Rev. Laws (1880), § 2684 *et seq.*

For divers cases illustrating the rule that the warning need indicate the subject-matter only with such reasonable certainty that no person interested be misled as to the proposition to be submitted, see *Moore v. Beattie*, 33 Vt. 219; *Ovitt v. Chase*, 37 Vt. 196; *Weeks v. Batchelder*, 41 Vt. 317.

As to requirements of the check-list and of posting it, see *Willard v. Pike*, 59 Vt. 202; *Wilson v. Wheeler*, 55 Vt. 446.

A vote may be rescinded before anything is done thereunder or rights of third parties have attached. *Estey v. Starr*, 56 Vt. 690.

After the due announcement and recording of a tie vote on the question of adopting the town school system, a majority vote was held void. *State v. Adams*, 58 Vt. 694.

A vote to pay a soldier a bounty in consideration of past enlistment and application on the town's quota, is binding, and its legal effects cannot be defeated by a rescission at a subsequent meeting. *Seymour v. Marlboro*, 40 Vt. 171; *Cox v. Mount Tabor*, 41 Vt. 28; *Haven v. Ludlow*, 41 Vt. 418; *Pottle v. Maidstone*, 39 Vt. 70; *Stiles v. Danville*, 42 Vt. 282.

A vote offering a bounty to such as should "enlist" before a certain date, was held to apply to one who had already enlisted under expectation there-

In *New York*, *New Jersey*, *Minnesota*, and *Nebraska*, some of the statutory provisions as to the conduct of annual meetings, their functions, etc., are analogous to those of the *New England* states.¹

of, and was afterwards mustered in and credited to the town's quota. *Johnson v. Newfane*, 40 Vt. 9.

Further, as to votes offering soldiers bounties, see *Livingston v. Albany*, 40 Vt. 666; *Davis v. Windsor*, 46 Vt. 210; *Hartwell v. Newark*, 41 Vt. 337; *Rogers v. Shelburne*, 42 Vt. 550; *Woods v. Springfield*, 43 Vt. 617; *Hatch v. Fairfield*, 43 Vt. 321; *Chase v. Middlesex*, 43 Vt. 679; *Jones v. Waterbury*, 44 Vt. 113.

A town may rescind a vote of a previous meeting, *e. g.*, to subscribe in aid of a railroad, if, meanwhile, nothing has been done thereunder, and no rights of third persons have attached. *Esty v. Starr*, 56 Vt. 690. Where a town cast a tie vote as to the adoption of the town school system, and this was announced by the moderator and recorded by the clerk, it was held on *quo warranto* that the town's authority upon the question was thereby exhausted, and a second vote at the same meeting resulting in a majority for the system, was void. *State v. Adams*, 58 Vt. 694.

1. In *New York*, eight days' notification must be given by the clerk. *Bird. New York Rev. Stat.* (1891), p. 3080, § 31. As to the place, etc., see *Sess. L.* (1892), p. 89. At each annual meeting, the electors determine the number of assessors, constables, and pound-masters to be chosen; elect town officers; raise a lawful sum for support of schools; direct as to the town's suits or controversies, and provide for the expense thereof; direct as to the exercise of the town's corporate powers; provide for the destruction of noxious weeds; maintain pounds; establish compensation of fence-viewers and collectors; regulate as to improvements of the town's lands, the maintenance of fences, and the seasons for animals to go at large; impose penalties on violations of regulations, not exceeding \$12.50 for each offense, and apply the recoveries as most conducive to the interests of the town; provide for support of the poor; provide for erection of lock-ups and a town house; and choose trustees of burying grounds, pp. 3077-9. See also p. 1215, § 24.

The requisites for the calling of a

town meeting are exemplified in *People v. Board of Audit*, 4 Hun (N. Y.) 95.

As to the requisites of notice of a special meeting, purposes, etc., see *Birge v. Berlin Bridge Co.*, 62 Hun (N. Y.) 618.

A town election was held not to be invalidated by the casting of marked ballots. *People v. Bidelman*, 69 Hun (N. Y.) 596.

As to the procedure for holding the annual town meeting, see *New York L.* (1892), ch. 569, § 10 (*Am. G. L. ch.* 20), p. 2229. As to the powers of town meetings, see § 24, p. 2234. As to meetings of the town boards, see § 160, p. 2258.

In the *New York Laws* of 1875, ch. 482, prescribing procedure for town meetings, "town elections" is not synonymous with "town meetings." In each election district, the whole town business is transacted in one town meeting. *People v. Orleans County*, 65 Hun (N. Y.) 481.

A town may by a majority vote establish and maintain a free public library. *New York Sess. L.* (1892), p. 783. Also purchase and order the use of Myers' automatic ballot-cabinets, p. 197. As to procedure for the election of town officers, see *People v. Shaw*, 133 N. Y. 493.

In *New Jersey*, one behaving disorderly in a town meeting is liable to removal, confinement, and fine. *New Jersey Revision* (1877), p. 1193, § 7.

A statute of 1860 provides that the next annual town meeting be held by ballot, etc., p. 1200, § 41.

In case of a tie vote between candidates for a township office, and of failure of the township committee to choose between them (as prescribed by *New Jersey Revision*, p. 1201, § 45), *mandamus* lies to compel them to proceed, and not to rescind their order to post the notices for such meeting. *State v. Boden*, 51 N. J. L., § 114. A township vote to raise a sum for fees not otherwise provided for by law, was held to be obscure and illegal. So also was held illegal, in the absence of express statutory authority, a vote to raise money to repair a certain wharf. *State v. Smith*, 47 N. J. L. 473.

A regular town meeting may order

New England towns in meeting, are equal; as to rights and

payment of a township officer's reasonable expenses in *bona fide* discharge of his duty; *e. g.*, in litigation as to the opening of a highway. *State v. Woolwich Tp.* (N. J. 1893), 27 Atl. Rep. 906.

For requisites of a resolution or vote to indemnify town officers for expenses incurred by them, see *State v. Hammon*, 38 N. J. L. 430.

In *Minnesota*, as to the powers of the town meeting, see the nine specifications in *Minnesota Gen. Stat.* (1891), § 1093.

In *Nebraska*, "In case any town in any county wherein township organization has been or may be adopted, shall refuse or neglect to organize and elect town officers at the time fixed by law, it shall be the duty of the board of supervisors of the county, upon the affidavit of any freeholder, resident of said town, filed in the office of the county clerk, setting forth the facts, to proceed at any regular or special meeting of the board and appoint the necessary town officers for such town." *Nebraska Consol. Stat.* (1891), § 958. "Special town meetings shall be held when the supervisor, town clerk, and justice of the peace, or any two of them, together with at least twelve freeholders of the town, shall in writing file in the office of the town clerk a statement that a special meeting is necessary to the interests of the town, setting forth the objects of the meeting; and the town clerk, or, in his absence, the supervisor, shall post up notices in five of the most public places." § 963. The engrafting of the western system of town government upon the eastern, is a very notable feature of section 957, which prescribes the powers of action of a *Nebraska* town meeting, viz.: "The electors present at the annual town meeting shall have power: First—To make all orders for the sale, conveyance, regulation or use of the corporate property of the town that may be deemed to be conducive to the interests of its inhabitants. Second—To take all necessary measures, and give directions for the exercise of their corporate power. Third—To provide for the institution, defense, or disposition of suits at law or in equity, in which the town is interested. Fourth—To take such action as shall induce the planting and cultivation of trees along the highways in such towns, and to protect and preserve trees

standing along or on highways. Fifth—To construct and keep in repair public wells, and to regulate the use thereof. Sixth—to prevent the exposure or deposit of offensive or injurious substances within the limits of the town. Seventh—to make such by-laws, rules, and regulations as may be deemed necessary to carry into effect the powers herein granted, and to impose such fines and penalties, not exceeding \$20 for one offense, as shall be deemed proper, except when a fine or penalty is already allowed by law, such fine or penalty to be imposed by any justice of the peace of the town where the offense is committed. Eighth—To direct the raising of money by taxation for the following purposes: 1st. For constructing or repairing roads and bridges within the town to the extent allowed by law. 2d. For the prosecution or defense of suits by or against the town, or in which it is interested. 3d. For any other purpose required by law. 4th. For the purpose of building or repairing bridges over streams dividing said town from any other town. 5th. For the support of the poor within the town; provided that when the county board of any county shall have established a poor-house under any statute law of the state, the support of the poor shall be provided for by the county board, and no taxes for that purpose shall be voted by the electors at town meetings, except sufficient to provide temporary relief. 6th. For the compensation of town officers at the rate allowed by law, and when no rate is fixed, for such amount as the electors may direct. Ninth—To guard against the destruction of property in said town by prairie fire. Tenth—To restrain, regulate, or prohibit the running at large of cattle, horses, mules, asses, swine, sheep, and goats, and determine when such animals may go at large, if at all; provided that all votes thereupon shall be by ballot. Eleventh—To authorize the distraining, impounding, and sale of cattle, horses, mules, asses, sheep, goats, and swine for penalties incurred, and costs proceedings; provided that the owner of such animals shall have the right to redeem the same from the purchaser thereof at any time within one month from the day of sale, by paying the amount of the purchaser's bid, with reasonable cost for their keeping, and

powers of action, those whose charters antedate the constitution have no reserved sovereignty.¹

In the other states, especially those in which the county is the principal unit, the town meeting is little else than an election.²

interest at the rate of seven per cent. per annum," § 957.

1. In *Bennington v. Park*, 50 Vt. 178—in holding the town to be estopped to deny the validity of its bonds issued (without meeting) upon a certificate of assent to railroad aid, under the *Vermont* Act of 1867 therefor—the court, by Powers, J., said: "The suggestion that towns in *Vermont*, especially *Bennington* and her sister towns, whose charters antedate the formation of the constitution, have certain chartered or natural rights which were never surrendered in the delegation of sovereignty to the state government, and which exist as a sort of civil birthright in *New England* society, among which is the inalienable and invaluable right of deliberating upon and discussing in town meeting all questions affecting town interests—advances a new theory of political rights never before evolved in the study of constitutional law. . . . They hold town meetings 'to discuss and deliberate upon questions affecting town interests,' not in virtue of any inherent right, but because the statute has provided that they shall hold such meetings. . . . Those old towns held town meetings, it is true; but those meetings were quite different in their character and purposes from meetings held by towns for municipal ends. They were meetings generally held for consultation upon measures of policy, not affecting towns in their local interests, but concerning the public welfare. They partook largely of the character of 'provisional parliaments,' convened for the purpose of devising means for the public safety while the settlers were preparing the way for some form of organized government. The men of those towns were the framers of the constitution; in it they . . . delegated to the legislative department the power 'to constitute towns,' and, if such new towns were to enjoy less privileges, or stand in any different subordination to the state government than the existing towns, it is remarkable that no mention of such difference is made in the constitution itself."

2. See ELECTIONS, vol. 6, p. 255;

MUNICIPAL CORPORATIONS, vol. 15, p. 1098. See also *infra*, this title, *Officers—Elections*; *Alabama* Code (1886), § 352 *et seq.*; *Arizona* Rev. Stat. (1887), § 160; *Arkansas* Dig. Stat. (1884), §§ 791, 2652 *et seq.*, 4109; *California* Pol. Code (1885), § 4109; *Colorado* Stat. (1891), § 4475; *Dakota* Comp. Laws (1887), § 1032 *et seq.*; *Delaware* Laws (1874), pp. 3, 60, 119; *Florida* Rev. Stat. (1892), § 661; *Georgia* Code (1882), § 778 *et seq.*; *Idaho* Rev. Stat. (1887), §§ 2232, 2246; *Illinois* Rev. Stat. (1891), p. 1497; *Cottonwood Tp. Board of Auditors v. People*, 38 Ill. App. 239; *Indiana* Stat. (1888), § 3305 *et seq.*; *McClain's Iowa* Code (1888), § 573 *et seq.*; *Kansas* Gen. Stat. (1889), § 7064 *et seq.*; *Kentucky* Gen. Stat. (1887), p. 506 *et seq.*; *Louisiana* Rev. Stat. (1876), p. 358 *et seq.*; *Maryland* Pub. Gen. Laws (1888), p. 618 *et seq.*; *Michigan* Gen. Stat. (1882), § 677; *Smith v. Chittenden*, 16 Mich. 152; *Mississippi* Code (1892), § 3028 *et seq.*; *Missouri* Rev. Stat. (1889), § 8440; *Montana* Comp. Stat. (1887), p. 678, § 316; *Nevada* Gen. Stat. (1885), § 1524 *et seq.*; *North Carolina* Code (1883), 3787; *Ohio* Rev. Stat. (1890), § 1448; *B. P. Pennsylvania* Dig. L., p. 674; *Tennessee* Code (1884), § 1630 *et seq.*; *Texas* Rev. Civ. Stat. (1889), art. 515, *et seq.*; *Utah* Comp. L. (1888), § 1822; *Virginia* Code (1887), § 1023 *et seq.*; *Washington* Gen. Stat. (1891), § 663; *West Virginia* Code (1891), p. 425; *Wisconsin* Annot. Stat. (1889), § 782 *et seq.*; *State v. Waterbury*, 79 Wis. 207; *Wisconsin* Cent. R. Co. v. *Ashland County*, 81 Wis. 1; *McVichie v. Knight*, 82 Wis. 157; *Wyoming* Sess. L. (1890), p. 119.

In the *Dakotas*, the authorization (*Dakota* Comp. L., § 716) of the town electors to vote to raise money to repair roads and bridges, was held not to import power to ratify an appropriation by the supervisors of ordinary town funds therefor. *Aldrich v. Collins* (S. Dak. 1892), 52 N. W. Rep. 854.

Under the *Illinois* Act of 1867, authorizing a town to subscribe to stock of a railroad company, "a majority of the legal voters of any township," is held to mean a majority of those voting, although those voting on both

V. POWERS AND PRIVILEGES.—The authority of a town, or civil township, as distinguished from a specially chartered municipal corporation, is only such as is prescribed by usage and general statute.¹

sides are a minority of all the legal voters of the township. *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644. *Compare Reiger v. Beaufort*, 70 N. Car. 319.

Upon loss of the record book, a town's vote—*e. g.*, to borrow money and issue bonds—may be proved by two witnesses. *Lemont v. Singer, etc.*, Stone Co., 98 Ill. 94.

In *Iowa*, a member of a town committee appointed to work up the voting in another township for subscription to a railroad, was afterwards employed by the railroad company to do the same thing in its behalf, and offered to pay voters fifty per cent. for the certificates of taxes paid by them. It was held that the tax so voted was void. *Chicago, etc., R. Co. v. Shea*, 67 Iowa 728.

In *Kansas*, a township vote appropriating more than enough to pay certain railroad bonds, was held to be void only as to the excess. *Turner v. Woodson County*, 27 Kan. 314.

The voters of a town, city or justice's precinct, may repeal the operation of a local option law within its limits, although adopted by the county. *Whisenhunt v. State*, 18 Tex. App. 491; *Woodlief v. State*, 21 Tex. App. 412.

In *Hubbard v. Williamstown*, 66 Wis. 551, at an annual town meeting a resolution was passed authorizing the supervisors "to use their own judgment" in repairing the abutments of a bridge, or removing it to another place. Afterwards, at a special town meeting, an offer of the owners of the abutments to sell to the town was accepted, and a written contract for the sale was afterwards made between the owners and the supervisors, wherein it was recited that it was made pursuant to the action of such special meeting. The proceedings of this special meeting were invalid because of insufficient notice of the same. The supervisors procured a bridge to be built upon the abutments, and town orders were issued to pay the builders. These facts were reported to, and approved at, the next annual town meeting. In an action against the town on the contract for the sale of the abutments, it was held, that the resolution adopted at the first annual meeting did not authorize the purchase; that the contract, being

based solely on the invalid action of the special meeting, was itself invalid; and that there was no ratification by the town of the contract.

The requirement in *Wisconsin* Rev. Stat., § 789, that the clerk record the request for a special town meeting, is merely discretionary; his omission to do so does not invalidate the proceedings. *State v. Decatur*, 58 Wis. 291.

Under *Wisconsin* Rev. Stat., § 776, a sum may, with notice, be voted to settle a claim for the support of a pauper. *Tuttle v. Weston*, 59 Wis. 151.

An accepted town vote in aid of a railroad, was held irrevocable, and not affected by an amendment of the state constitution in *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543.

In the absence of statutory direction for the procedure of a town meeting, the general rules of parliamentary law, so far as applicable, govern. So held, as to the ordering of a meeting for the election of a town treasurer. *State v. Davidson*, 32 Wis. 114. Further, as to town meetings, see *State v. Doyle*, 84 Wis. 678.

1. *Seele v. Deering*, 79 Me. 346; *Rumford School Dist. v. Wood*, 13 Mass. 193; *Shronk v. Penn Tp.*, 3 Rawle (Pa.) 347; *Hopple v. Brown Tp.*, 13 Ohio St. 311; *Booth v. Woodbury*, 32 Conn. 118; *Baldwin v. North Braintree*, 32 Conn. 47; *Webster v. Harwinton*, 32 Conn. 131; *Christie v. Malden*, 23 W. Va. 667; *Ravenswood v. Flemings*, 22 W. Va. 52; *Hooper v. Emery*, 14 Me. 375.

In *Anthony v. Adams*, 1 Met. (Mass.) 284, the court, by Shaw, C. J., said: "A town, in its corporate capacity, is not bound, even by the express vote of a majority, to the performance of contracts, or other legal duties not coming within the scope of the objects and purposes for which they are incorporated."

As to the taxing power, assessments for local improvements, etc., see *TAXATION*, vol. 25, p. 5.

As to the power to take land, etc., see *EMINENT DOMAIN*, vol. 6, p. 517.

As to representative powers, agents, ordinances, etc., see *supra*, this title, *Governing Bodies; infra, Officers—Powers and Duties.*

The authority so conferred or acquired is to be exercised solely for the purpose for which the town is created.¹

Under authority to make appropriations for the necessary charges arising against the town, money may be expended for purposes which will look to the safety and convenience of the citizens;² under such a provision, a town may make appropria-

As to town bonds, see *infra*, this title, *Duties and Liabilities—Upon Contracts—Town Bonds*.

A judgment against a town decided by the supreme court not to be constitutionally incorporated, is a nullity. *Colton v. Rossi*, 9 Cal. 595.

A town cannot do indirectly what it has no power to do directly. It cannot abate a tax, nor excuse a collector from collecting it, nor compensate a delinquent town officer for loss from his neglect of duty. *Thorndike v. Camden*, 82 Me. 39.

Charter Rights in Conflict with Previous Statute.—A provision in a town charter will prevail over an inconsistent one in an earlier general law. *Bracket v. People*, 72 Ill. 573. In *Re Snell*, 58 Vt. 207, a charter authorizing the suppression of gaming was held to repeal by implication a statute authorizing the selectmen to permit or forbid the use of billiard tables.

But the powers of the state and county courts are not divested by the act incorporating a town, unless expressly so declared. *Baldwin v. Green*, 10 Mo. 410.

1. *Stetson v. Kempton*, 13 Mass. 272. In *Parsons v. Goshen*, 11 Pick. (Mass.) 396, *Wilde, J.*, said: "A town, in its corporate capacity, will not be bound even by the expressed vote of the majority, to the performance of contracts or other legal duties, not within the scope of the objects and purposes to which they are incorporated."

A civil township cannot make a contract for the benefit of school property. *Jackson Tp. v. Barnes*, 55 Ind. 136.

A town cannot raise a fund towards keeping a private cemetery in repair and decorating graves of certain individuals, even though it may avail itself of a conditional bequest. *Luques v. Dresden*, 77 Me. 186.

A town has no power to seize a vessel in quarantine, and convert it into a hospital. *Mitchell v. Rockland*, 45 Me. 496.

2. *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71.

Under such a general power it has been held that a town may compensate a committee appointed to execute its statutory powers in procuring water supply, *Arlington v. Pierce*, 122 Mass. 270; may employ and pay agents and counsel to suppress illegal sales of liquor, *Dunn v. Framingham*, 132 Mass. 436; may indemnify an officer for liability incurred while acting in excess of his duty; *e.g.*, a highway surveyor's encroachment in draining a roadway, *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566; 29 Am. Dec. 23; may subscribe for the track of a railroad corporation, and become an associate in its formation, *Kittredge v. North Brookfield*, 138 Mass. 286; but cannot appropriate money to pay expenses incurred before incorporation in procuring its charter, *Frost v. Belmont*, 6 Allen (Mass.) 152; or pay the expenses of a committee directed by vote thereof to petition the legislature for annexation to another town, *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52; or expenses incurred in opposing such annexation, *Coolidge v. Brookline*, 114 Mass. 592; *Westbrook v. Deerling*, 63 Me. 231. But see *Mass. St.* 1889, ch. 380; *Connolly v. Beverly*, 151 Mass. 437; or expenses of a committee to procure the passage of an unconstitutional act, *Mead v. Acton*, 139 Mass. 341.

One town cannot raise money to build or to repair a bridge in another. *Concord v. Boscawen*, 17 N. H. 465.

A town may appoint a special collector of taxes necessary to pay a judgment against the town. *Webb v. Beaufort*, 88 N. Car. 496.

A town may appropriate a reasonable amount to employ a counsel to defend its officers sued for their official *bona fide* acts. *Roper v. Laurinberg*, 90 N. Car. 427; *Cullen v. Carthage*, 103 Ind. 196.

A town, in accepting testamentary provision for a public library, cannot bind itself to expend therein more than is allowed by the statute therefor. *Drury v. Natick*, 10 Allen (Mass.) 169.

A town's contract to allow a dramatic company the use of its town-

tions for, and erect buildings for, governmental purposes and purposes consistent with its creation, such as school buildings, when created for school purposes.¹ The power to issue commercial paper is not to be conceded unless by virtue of express legislation or necessary implication.² Unless expressly authorized by statute to do so,³ a town cannot vote bounties for military enlistments.⁴

Among the powers usually conferred upon towns and townships, is the general power of internal regulation,⁵ the power

house for six years, when not wanted for town purposes, in consideration of money to be expended in enlarging and repairs, was held not *ultra vires*. *Jones v. Sanford*, 66 Me. 585.

The contract of an incorporated town for the construction of a levee is *ultra vires* and void. The town is not stopped by having permitted and accepted the work. *Newport v. Batesville, etc.*, R. Co. (Ark. 1893), 24 S. W. Rep. 427.

A state statute forbidding a town to borrow money save on petition, etc., does not apply to the purchase of articles of necessity; *e. g.*, a reversible road-scraper. *Fowler v. F. C. Austin Mfg. Co.*, 5 Ind. App. 489.

Private Enterprise.—The legislature cannot constitutionally authorize towns to loan their credit to such persons as, in consideration thereof, will engage therein in manufacturing for their private emolument. *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185.

Bridges.—A town's contract to build a bridge is not, in the statutory sense, "necessary to the exercise of its corporate or administrative powers," and can only be authorized by express legislation. *Donnelly v. Ossining*, 18 Hun (N. Y.) 352; *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477.

A town has no power to accept the *Connecticut* portion of a bridge lying partly in another state and built by private subscription. *Abendroth v. Greenwich*, 29 Conn. 356.

1. *Allen v. Taunton*, 19 Pick. (Mass.) 485; *Bates v. Bassett*, 60 Vt. 530.

The erection of a town-house is one of the "necessary charges therein," and imports, as incidental to the power, discretionary right to make additional compensation to a subcontractor. *Friend v. Gilbert*, 108 Mass. 408.

Under special authority "to prevent and extinguish fires" and, in general, to provide a suitable place for town business, a town may erect a fire-engine

house and provide for a public hall over the engine-room. *Clarke v. Brookfield*, 81 Mo. 503; 51 Am. Rep. 243.

A town may, within reasonable limits, judge for itself of the architecture. It cannot, without special statute, erect a building for rental. *White v. Stamford*, 37 Conn. 578.

A town erecting a town-house may provide therein for prospective wants, let rooms therein, and have a lock-up thereunder. *French v. Quincy*, 3 Allen (Mass.) 9.

A town may provide for the support of a public clock. *Willard v. Newburyport*, 12 Pick. (Mass.) 227.

But unless expressly authorized to do so towns cannot appropriate money for defense against an invading enemy; nor for a building for purposes of mere amusement, nor for a monument not designed for ornamentation in a populous place. *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145.

2. See MUNICIPAL SECURITIES, vol. 15, p. 1204.

The power to issue commercial paper is foreign to the objects of the creation of the political divisions of counties. Statutory power in a county to erect necessary county buildings, does not authorize the issuance of commercial paper as evidence of, or security for, a debt contracted for constructing them. *Claiborne County v. Brooks*, 111 U. S. 400.

3. *Davis v. Putney*, 43 Vt. 582.

4. *Farr v. Warren*, 98 Mass. 229; *Butler v. Putney*, 43 Vt. 481; *Loughton v. Putney*, 43 Vt. 485; *Swift v. Elmer*, 44 Vt. 87; *Cover v. Baytown*, 12 Minn. 124.

5. **Police Regulations.**—(See POLICE POWER, vol. 18, p. 739.)

A statute authorizing towns to make "all by-laws that may be necessary to preserve the peace, good order, and internal police" therein, and to annex penalties, etc., is held not to import power to prohibit selling "strong

to sue and be sued,¹ and to acquire and hold real estate for

beer, ale, or any other intoxicating liquor in a less quantity than twenty gallons." *Com. v. Turner*, 1 Cush. (Mass.) 493.

A statute empowering towns to make such ordinances, not inconsistent with state laws, as are necessary to promote the prosperity and improve the morals of the inhabitants, does not authorize a town council to proscribe a particular class of persons against whom no overt act is charged; *e. g.*, to make it a misdemeanor for a prostitute to be found within the town limits. *Buell v. State*, 45 Ark. 336, *citing* *Milliken v. Weatherford*, 54 Tex. 388, and *doubting* the *Hagerstown* case, *Shafer v. Mumma*, 17 Md. 331; 79 Am. Dec. 656.

Power to "establish and keep up" a market, does not authorize an ordinance excluding persons from selling elsewhere in market hours. *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789.

A village whose charter authorizes it to prohibit running and soliciting for hotels, may prohibit soliciting even on the solicitor's property. *Niagara Falls v. Salt*, 45 Hun (N. Y.) 41.

Although a statute permits towns to regulate fisheries, a by-law prohibiting other than the town's inhabitants from taking shell-fish, contravenes a common-law right, and is invalid. *Hayden v. Noyes*, 5 Conn. 391. But *compare* *Rogers v. Jones*, 1 Wend. (N. Y.) 237; 19 Am. Dec. 493. So, also, is invalid a by-law allowing the inhabitants to pasture their cows in the public highways. *Woodruff v. Neal*, 28 Conn. 165.

A town may impound and summarily sell cattle found running at large. *Brophy v. Hyatt*, 10 Colo. 223.

A town may discontinue a town way, but not a landing place, abatement of nuisances whereon is distinctly provided for by statute. *Com. v. Tucker*, 2 Pick. (Mass.) 44.

In *Arkansas*, both the state, as against general statute, and the town, as against ordinance, may punish the offense of carrying concealed weapons. *Van Buren v. Wells*, 53 Ark. 368. So, also, that of selling liquor on Sunday. *Cassidy v. Texarkana*, 53 Ark. 368. A statute authorizing a town to suppress dram-shops, does not import power to prohibit liquor-selling without a license. *Tuck v. Waldron*, 31 Ark. 462.

Within the statute allowing towns to restrain dogs, a dog is "going at

large," if following loose the accompanying person so far as to be beyond his control in preventing mischief. *Com. v. Dow*, 10 Met. (Mass.) 382.

Fire Regulations.—Power to "make regulations for guarding against damage from fires," imports power to ordain fire limits, and to prohibit the erection of wooden buildings therein. *Charleston v. Reed*, 27 W. Va. 681; 55 Am. Rep. 336.

A town council may remove a wooden building erected contrary to the ordinance inhibiting the same, to prevent fire in a locality. *McKibbin v. Fort Smith*, 35 Ark. 352.

Streets.—A town's omission to pass a general ordinance respecting sidewalks, does not impair its control over the streets; it may still intrust to the road commissioner the responsibility of the details; *e. g.*, laying out a sidewalk across an abutter's lawn. *Bowers v. Barrett*, 85 Me. 382.

Nuisances.—The power given to cities and towns by *Iowa* Code, § 456, to abate nuisances, imports no authority for an ordinance to punish by fine. *Nevada v. Hutchins*, 59 Iowa 506; *Knoxville v. Chicago*, etc., R. Co., 83 Iowa 636.

Inhibition of Power.—An inhibition in a village charter against exercising police power against a certain company for two years, was held not to be a grant, but only a regulation enforceable after two years. *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 631.

1. Under the general power to sue and be sued it has been held that a township may sue on a bond given to its road commissioners by name. *Anderson v. Hamilton Tp.*, 25 Pa. St. 75. So, also, on a bond given to its auditors, *Dyer v. Covington Tp.*, 28 Pa. St. 186; *Young v. Machamer*, 1 Pears. (Pa.) 303; and as indorsee; and this, without vote, *Augusta v. Leadbetter*, 16 Me. 45.

A town has no right of action against a fraudulent claimant, to recover money spent to prove the claim groundless. Thus in this suit ("case"), Judge Carpenter remarked that if the town relied on false representations that a horse was injured by a highway defect, it did not investigate them; if it did not investigate them, it did not rely upon them. *Enfield v. Colburn*, 63 N. H. 218.

A town cannot recover over of a wrongdoer whose act has caused a personal injury, without allegation and

corporate purposes.¹ The powers and privileges of towns and townships depend, for the most part, on statutes, and because of these various statutory provisions touching such powers and privileges, special reference must be made to the adjudications in the different states of the Union; for which see note 2.

proof of its primary liability. *Fahey v. Harvard*, 62 Ill. 28.

Any inhabitant of a town is a party to a suit against it, and may appear and defend therein. *Union v. Crawford*, 19 Conn. 331.

Rights of action accruing to a town in its municipal capacity may be joined with those in its parochial capacity. *Alna v. Plumer*, 3 Me. 88.

The Statute of Limitations does not begin to run against the inhabitants of a town until it is incorporated. But the claim of an occupant of a lot therein is ground of compromise with them. *Reiley v. Chouquette*, 18 Mo. 220.

Under the *Massachusetts* Act of 1869, authorizing the Middlesex county commissioners, on approval by the towns, to lay out certain drains, assess benefits, and award damages, they and not the town are the proper party to a suit to enjoin obstruction. *Melrose v. Cutter* (Mass. 1893), 34 N. E. Rep. 695.

Action for Injury to Highway.—A town can recover for the destruction or obstruction of a highway, or for conversion of the material. *Troy v. Cheshire R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Laconia v. Gilman*, 55 N. H. 127.

A town bound to repair a highway, though not strictly the owner, may enforce a covenant originally made with it to keep a portion—*e. g.*, bridge approaches—in repair. *Middlefield v. Church Mills Knitting Co.* (Mass. 1894), 35 N. E. Rep. 780. But see *Fishkill v. Fishkill*, etc., R. Co., 22 Barb. (N. Y.) 634.

But it is held that a town cannot recover of an individual for his injuring a highway, until put to expense in consequence thereof. *Freedom v. Weed*, 40 Me. 383.

A town cannot maintain trespass, *quare clausum fregit*, where the *locus in quo* is a national road, the fee whereof is in the state; the town having only a qualified possession for repairing it. *St. Louis, etc., R. Co. v. Summit*, 3 Ill. App. 155.

Action Against Rioters.—The fact

that a town has, in pursuance of an award, voluntarily paid a citizen for destruction of property in a riot, does not preclude its maintaining an action against the rioters. *Hanover v. Dewey*, 58 N. H. 485.

1. See *Conner v. New Albany*, 1 Blackf. (Ind.) 43; *Booth v. Coventry*, 4 Vt. 297; *Beach v. Haynes*, 12 Vt. 15; *Windham v. Portland*, 4 Mass. 384.

Incorporation vests in a town no title to lands not before granted. *South Hampton v. Fowler*, 52 N. H. 225.

Under the power to acquire and hold real estate, a town may purchase at sheriff's sale, and maintain its title to real estate which has been taken upon execution in its favor. *Corinth v. Locke*, 62 Vt. 411.

The right to purchase land outside the municipality, is held to import the right to extend a sewer outside. *Calton v. Jacksonville* (Ill. 1893), 35 N. E. Rep. 223.

In *Rhode Island*, a town may acquire realty by possession for other than municipal purposes; *e. g.*, for sale or lease for alleviation of town burdens. Otherwise, as to purchasing therefor, as this requires expenditure. *New Shoreham v. Ball*, 14 R. I. 566.

Towns as Riparian Owners.—The rule that an upper riparian owner may reasonably use the water, though to the injury of the lower, was applied, where two villages were the parties in interest. *Barry Water Co. v. Carnes*, 65 Vt. 626, *following* *Spence v. McDonough*, 77 Iowa 46; *Evans v. Merriweather*, 4 Ill. 492; 38 Am. Dec. 106.

2. In *Connecticut*, a town may establish a public square, maintain a fire department, make by-laws as to sidewalks, the taking of birds, and fisheries, offer a bounty for killing certain wild animals, provide for the observance of Decoration Day, erect a soldiers' monument, issue and reissue bonds to pay indebtedness, maintain a free public library, erect sign-posts, and provide a fire-proof structure for records. *Connecticut Gen. Stat.* (1888), § 132 *et seq.*

In the *Dakotas*, for the general provisions as to towns, see *Dakota Comp.*

L. (1887), § 1022 *et seq.* See also § 716, upon powers of the electors in meeting, as construed in *Aldrich v. Collins* (S. Dak. 1892), 52 N. W. Rep. 854.

In *South Dakota*, mere general language granting the power to condemn, does not include power to appropriate land already subjected to a public use, where the proposed use will interfere with the former. *Winona, etc., R. Co. v. Watertown* (S. Dak. 1893), 56 N. W. Rep. 1077.

In *Iowa*, the powers of towns are very similar to those of the *Dakotas*. McClain's *Iowa Code* (1888), § 615 *et seq.*

The power of a municipality to dispose of a site or other property, does not import authority to discharge a debtor, *Washington Dist. Tp. v. Thomas*, 59 Iowa 50; nor to convey real estate in consideration of the location of the county seat. *Brockman v. Creston*, 79 Iowa 587.

A township cannot sue. On demurrer the clerk may be substituted. *Wells v. Stomback*, 59 Iowa 376.

A township was held entitled to recover upon a note given for a loan of its funds, that had been lawfully made by its directors. *Pleasant Valley v. Calvin*, 59 Iowa 189.

In *Kansas*, each organized township is a body politic and corporate; it may contract, may sue and be sued, etc. *Kansas Gen. Stat.* (1889), § 7061.

A township may contract for the building of a bridge conjointly with the county. *Uhl v. Douglass Tp.*, 27 Kan. 80.

In *Illinois*, a town has power "to sue and be sued, to acquire by purchase, gift, or devise, and to hold property, both real and personal, for the use of its inhabitants, and again to sell and convey the same; to make all such contracts as may be necessary in the exercise of the powers of the town." *Illinois Rev. Stat.* (1891), p. 1493b, § 39.

The trustees of schools are a *quasi* corporation wholly as to schools of the township; it cannot, through them, become a stockholder in a railway corporation, with a power to issue bonds, etc. *People v. Dupuyt*, 71 Ill. 651.

A town may order its attorney to assist the state's attorney in conducting prosecutions in which, through its right to receive the fine, or otherwise, it has a special interest; and it may pay him therefor. *People v. Warren*, 14 Ill. App. 296.

In *Massachusetts*, *Maine*, and *New Hampshire*, the powers and privileges

of towns and townships are very similar.

A town may grant to a private individual the right to regulate the flow of a stream, by dams and sluices. *Berry v. Raddin*, 11 Allen (Mass.) 577.

A town grant of land for a meeting-house, is held to include sufficient area for tying the parishoners' horses. *First Parish v. Middlesex County*, 7 Gray (Mass.) 106.

A town grant, to a private person, of outlet waters of a certain "great pond" for mill purposes for the town's needs, will be construed most liberally in favor of the grantee. *Berry v. Raddin*, 11 Allen (Mass.) 577. Towns may, by reasonable by-laws, regulate the use of great ponds; *e. g.*, as to ice-cutting. *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158.

The legislature cannot authorize towns and cities to buy fuel to sell to inhabitants, *Justices' Opinion*, 155 Mass. 598; nor can a town under any existing *Massachusetts* statute, erect and maintain works for lighting streets by electricity or thereby distributing light to the inhabitants, *Spaulding v. Peabody*, 153 Mass. 129. But see *Justice's Opinion*, 150 Mass. 592.

It was early held that a town might remove its house of worship from one place to another, though the pews be the property of individuals. *Fisher v. Glover*, 4 N. H. 180.

A statute authorizing highway surveyors to "remove" whatever obstructs a highway, imports no power to maintain a bill in equity where no special damage is sustained; the town's proper remedy is by indictment or by information by the attorney-general. *Needham v. New York, etc., R. Co.*, 152 Mass. 61.

A town cannot, without a corporate vote, acquire rights in land by its officers having long taken gravel therefrom under a claim of right in the town. *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42.

A town may acquire by prescription a private right of way as appurtenant to a burial ground owned by the town. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325.

Eminent Domain.—As to a town's right of eminent domain, see *Trowbridge v. Brookline*, 144 Mass. 139; *Page v. O'Toole*, 144 Mass. 303; *Kenison v. Arlington*, 144 Mass. 456; *White v. Foxborough*, 151 Mass. 28.

In *Missouri*, a town cannot accom-

plish by an order, that which, under its charter, can be done only by an ordinance. So held, as to an ordinance which, without providing for the levy, assumed to allow abutting owners, on petition, to obtain an order for street improvements, to be paid for by special tax bills. *Trenton v. Coyle*, 107 Mo. 193.

Charter power to compel paving, imports power to compel repaving. *McCormack v. Patchin*, 53 Mo. 33; 14 Am. Rep. 440.

In *New Jersey*, the electors in a township meeting may vote money for the support of the poor, repairing pounds, providing roads, destroying noxious wild animals and birds, ascertaining the township lines, prosecuting and defending its common rights, and for other necessary charges and legal objects. *New Jersey Revision* (1877), p. 1194, § 11.

Street boundaries cannot be determined without allowing the abutters to be heard. *Voorhees v. Bound Brook* (N. J. 1893), 26 Atl. Rep. 710.

The authority of a town to contract for a water supply for ten years, was held not to import power to require the company, before laying the pipes, to agree to furnish the water for twenty years at a specified rate. *State v. Harrison*, 46 N. J. L. 79.

In *New York*, each town, as a body corporate, has capacity to sue and be sued; to purchase and hold lands within its own limits, and for the use of its inhabitants, subject to the power of the legislature over such limits; to make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers; and to make such orders for the disposition, regulation, or use of its corporate property, as may be deemed conducive to the interests of its inhabitants. *Bird*, *New York Rev. Stat.* (1890), p. 3075, § 1. The law of 1885, ch. 451, authorizing towns to borrow money for bridge purposes, did not affect the town's power in a meeting to raise a tax for road and bridge purposes. Nor did the law of 1886, ch. 259, as to the power of a special meeting to make a bridge appropriation, abolish the limitation as to the amount. *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477. A bequest to a town, to be absolute, must be for some corporate purpose. A bequest "for the benefit of the poor," was held invalid. *Fosdick v. Hempstead*, 125 N. Y. 581.

A town cannot, under 1 *New York Rev. Stat.*, p. 337, receive a bequest to be devoted under certain conditions to the erection of a town hall. Matter of *Underhill's Will*, 6 Dem. (N. Y.) 466.

The provision of *New York Sess. L.* (1891), ch. 164, for the expenditure of surplus moneys by the town authorities, does not apply to funds directed by Sess. L. (1880), ch. 212, and 1883, ch. 458, to purposes which exhaust them. *McKane v. Voorhies*, 19 N. Y. Supp. 141; 64 Hun (N. Y.) 634. A town or village may, by valid by-laws, prescribe limits for the sale of meat. *Bush v. Seabury*, 8 John. (N. Y.) 418. A by-law requiring a license from hucksters, grocers, etc., was held to be void, as in restraint of trade. *Dunham v. Rochester*, 5 Cow. (N. Y.) 462. But compare *Thomas v. Mt. Vernon*, 9 Ohio 290.

A street in an unincorporated village is subject to use for the purpose of supplying the inhabitants with water. This imposes no additional burden upon the fee of the street; hence the owners thereof cannot compel a removal of the water-pipes. *Witcher v. Holland Water-Works Co.*, 66 Hun (N. Y.) 619.

Actual acceptance by the municipal authorities, or implied acceptance by the public for due lapse of time, is necessary to a complete dedication of lands for a street. *In re Beach Ave.*, 70 Hun (N. Y.) 351. Posting of a map by the village trustees and working a part of the streets, imports acceptance. *People v. Underhill*, 69 Hun (N. Y.) 86; *People v. Kellogg*, 67 Hun (N. Y.) 546.

See the requisites of procedure under *New York Law* of 1853, ch. 62, to compel a railway company to take a street across its tracks in *People v. New York Cent.*, etc., R. Co., 69 Hun (N. Y.) 166.

In *Ohio*, a civil township is a body corporate, may sue and be sued, hold real estate by devise or deed, or personal property for its benefit for any useful purpose, sell and convey, etc. *Ohio Rev. Stat.* (1890), § 1376.

The State of *Ohio*, in its sovereign character, has reserved no property interest in the streets of a city or town. *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 306.

As to the construction of the "Taylor Law" of 1886, regulating rights and liabilities in local improvements, the front-foot rule, etc., see *Parsons v. Columbus* (Ohio, 1893), 34 N. E. Rep. 677; *Haviland v. Columbus* (Ohio, 1893), 34 N. E. Rep. 679; *Costello v. Wyoming*, 49 Ohio St. 202.

VI. DUTIES AND LIABILITIES—1. In General; Acts of Officers.—The general principles governing the liability of municipal corporations, which have been considered elsewhere in this work,¹ apply to the towns of many states. In the notes will be found many cases showing when, and to what extent, towns are liable for the acts of their officers.²

In *Vermont*, towns in existence when the constitution was formed, have no reserved sovereignty peculiar to themselves. Such town is equally with others estopped to deny the validity of its railroad bonds. Its rights and liabilities, under its action in the modern town meetings, are wholly statutory. *Bennington v. Park*, 50 Vt. 178.

In *Wisconsin*, towns of 2000 inhabitants may establish and maintain a free public library. *Wisconsin Annot. Stat.* (1889), § 931. A statute imposing a penalty for allowing animals to run at large excludes other remedies; and a by-law providing for their impounding and sale is invalid. *Miles v. Chamberlain*, 17 Wis. 446.

A town may get a person enjoined from obstructing a highway; *e. g.*, with logs and lumber. *Neshkoro v. Nest* (Wis. 1893), 55 N. W. Rep. 176. Compare *Eau Claire v. Matzke* (Wis. 1893), 56 N. W. Rep. 874.

As to requisites of proceedings of the town board in establishing a ditch, see *State v. Curtis* (Wis. 1893), 56 N. W. Rep. 475.

As to a town's rights in appropriating the rent of town buildings, see *Beaver Dam v. Frings*, 17 Wis. 398.

1. See *MANDAMUS*, vol. 14, pp. 88, 165; *MUNICIPAL CORPORATIONS*, vol. 15, pp. 1076, 1106; *POOR AND POOR LAWS*, vol. 18, p. 812; *PUBLIC OFFICERS*, vol. 19, p. 510.

2. In *Connecticut*, a town was held not to be bound by an award under a submission made without joint action of all the selectmen. *Haddam v. East Lyme*, 54 Conn. 34. A town was held not liable for damage from an extraordinary flood; its engineer having exercised skill and reasonable care in straightening the channel. *Diamond Match Co. v. New Haven*, 55 Conn. 510. Under the *Connecticut* statute providing that persons authorized to repair highways, may make any water-course for draining into or through any person's land, so far as necessary, a borough was held not liable for damage from acts of its servants, not wanton or negligent. *Bronson v. Wallingford*, 54 Conn. 513. A

person contracting for the building of a schoolhouse, was held chargeable with notice of the town committee's limitation of the sum and of outstanding debts to others thereon. It was immaterial that the town used the house. *Turney v. Bridgeport*, 55 Conn. 412. Statutory imposition of a duty upon a town to pay damages for sheep killed by dogs, does not in law imply any contract of the town to pay therefor without a consideration. *Davis v. Seymour*, 59 Conn. 531. For the requisites of allegation and proof to recover of a town the statutory penalty for failure of its selectmen to erect guide-posts, see *Bronson v. Washington*, 57 Conn. 346. The costs for which a town is eventually liable after commitment of a prisoner by a justice of the peace, include only taxes; and not those for his support by the county-jail keeper. *Norwich v. Hyde*, 7 Conn. 528. No recovery can be had of the town for sheep killed by dogs, except the amount of the estimate made by the selectmen under *Connecticut Gen. Stat.*, § 3752. *Van Hoosier v. Wilton*, 62 Conn. 106.

In *Georgia*, a municipality is not liable for an error of judgment of its council in refusing a liquor license, no malice or corruption being shown. *Duke v. Rome*, 20 Ga. 635.

A municipality is not liable for the *ultra vires* acts of its officers; *e. g.*, in excavating a ditch outside the corporate limits. *Lloyd v. Columbus*, 90 Ga. 20. A municipality is not liable for torts of its police officers. *McElroy v. Albany*, 65 Ga. 387; 38 Am. Rep. 791; *Wilson v. Macon*, 88 Ga. 455.

The constitutional right of compensation for property taken for public uses, was held not to apply to grain wet by a flood and declared by the municipal authorities to be dangerous to the public health. *Dunbar v. Augusta*, 90 Ga. 390.

In *Illinois*, a town is not liable to a landowner for damages from a highway commissioner's unlawful diversion of a water-course. *Cooney v. Hartland*, 95 Ill. 516. In the absence of

special statutory provision therefor, township and other public involuntary corporations are not liable civilly for neglect of duty. *Elmore v. Drainage Com'rs*, 135 Ill. 269.

One town is not liable to another for the support of a pauper after notification of offer and of the pauper's refusal to remove and be supported. *Fox v. Bristol*, 45 Ill. App. 330.

A charter provision for election of officers on a certain day, was held to be simply directory; failure to elect thereon did not prevent organization of the town. *Coles County v. Allison*, 23 Ill. 437.

The rule that one dealing with a public officer must see whether he is acting within his statutory authority, was applied to a village supervisor's lease of commons in *Tamm v. La-valle*, 92 Ill. 263.

The remedy of an abutter for damages from the highway commissioners' diversion of a stream, is against them individually, not against the town. *Cooney v. Hartland*, 95 Ill. 516.

A town owning the fee of the street, was held not liable to an abutter because of a street-railway company's heightening of the grade, causing an obstruction of his view, under the town's grant and legal authority to construct, etc. *Olney v. Wharf*, 115 Ill. 519; 56 Am. Rep. 178, *quoting* *Murphy v. Chicago*, 29 Ill. 286; 81 Am. Dec. 307, and *distinguishing* *Nevins v. Peoria*, 41 Ill. 507; 89 Am. Dec. 392.

In *Indiana*, a township is not bound by acts of its trustee performed after his successor is lawfully qualified. *Steinback v. State*, 38 Ind. 483. He may be enjoined from contracting debts beyond the limit prescribed in *Indiana* Rev. Stat. (1888), § 6006. *Middleton v. Greeson*, 106 Ind. 18. As to the requisites of practice in suits by or against townships, see *Vogel v. Brown Tp.*, 112 Ind. 317; *Cicero Tp. v. Shirk*, 122 Ind. 572. A town's power under *Indiana* Stat., § 4488, to borrow money for lawful purposes, does not import power to issue negotiable securities, to be sold free from equities that may be set up by the maker. *Merrill v. Monticello*, 138 U. S. 673.

A town was held not to be liable for an arrest by its marshal under an invalid ordinance and without a warrant. *Laurel v. Blue*, 1 Ind. App. 128, *citing* *Dill*, on *Mun. Corp.* (4th ed.), § 975.

A road supervisor is not such an agent of the township as will render it

liable for damages to abutting owners from the negligent construction of a ditch. *Union Civ. Tp. v. Berryman*, 3 Ind. App. 314. A municipality was held not to be liable for damages to A's house from the fall of a wall of B's partially burnt building across an alley, although the marshal had promised B to take it down if necessary. *Anderson v. East*, 117 Ind. 126.

One cannot recover of a township on a certificate issued by the trustees without consideration; *e. g.*, for school supplies never delivered. *State v. Hawes*, 112 Ind. 328.

The civil town or township, and the school town or township, being distinct corporations, can sue and be sued each in its own corporate name. *Wright v. Stockman*, 59 Ind. 65.

In *Iowa*, a township is a mere subdivision for governmental purposes, and has no corporate powers and liabilities as such. *West Bend v. Munch*, 52 Iowa 132. The name of the proper officer may, by amendment, be substituted for that of the township. *Wells v. Stomback*, 59 Iowa 376.

An incorporated town cannot escape liability for injuries sustained by reason of the unsafe condition of its streets, on the ground that they were put in such condition by the road-district supervisor. *Clark v. Epworth*, 56 Iowa 462.

A town was held not liable for injuries from fireworks, though the discharge was participated in by its officers and a majority of its citizens. *Ball v. Woodbine*, 61 Iowa 83; 47 Am. Rep. 805, *following* *Morrison v. Lawrence*, 98 Mass. 219.

A town was held not liable for the improper location of a ditch which it had authority to construct. *Wicks v. De Witt*, 54 Iowa 130.

In *Kansas*, a township was held liable for the expense of a notice of a special election called by the county commissioners. *Center Tp. v. Gilmore*, 31 Kan 675.

A municipality is not liable for injury to person or property from negligence of its police officers; *e. g.*, the marshal allowing a sham battle resulting in the death of a non-participant from a gun-wad. *Jolly v. Hawesville*, 89 Ky. 279.

The *Maine* Statute (Rev. Stat. (1883), ch. 84, § 30), authorizing executions upon judgments against towns to be issued against inhabitants' goods, does not contravene the constitutional in-

hibition of deprivation of one's property without due process of law. *Eames v. Savage*, 77 Me. 212; 52 Am. Rep. 751.

As to when equity will compel specific performance of a contract by a municipality, see *Gove v. Biddeford*, 85 Me. 393, *citing* *Rendall v. Frey*, 74 Wis. 26; *Horton v. Nashville*, 4 Lea (Tenn.) 39; *Mills v. Brooklyn*, 32 N. Y. 495.

A municipality may transfer to a railroad, a street and culvert, so as not to be liable for a personal injury from a defect thereof. *Lander v. Bath*, 85 Me. 141.

A town is not liable for the misconduct of a public officer in work—*v. g.*, a highway surveyor building a bridge—unless it has directed him therein. *Goddard v. Harpswell*, 84 Me. 499, *citing* *Bulger v. Eden*, 82 Me. 352; *Farrington v. Anson*, 77 Me. 406; *Cobb v. Portland*, 55 Me. 381; 92 Am. Dec. 598; *Mitchell v. Rockland*, 52 Me. 118; *Woodcock v. Calais*, 66 Me. 234; *Small v. Danville*, 51 Me. 359.

As to a town's liability for necessities furnished to sick or indigent persons, see *Kennebunk v. Alfred*, 19 Me. 221; *Brown v. Orland*, 36 Me. 376.

See the requisites of the clerk's notice to the assessors that a fine has been imposed under a conviction on indictment of the town for a defective highway, in *State v. Oxford*, 65 Me. 210.

As to the liability of a town under *Maine* Rev. Stat., ch. 123, to indemnify the owner of property destroyed by a mob, see *Brightman v. Bristol*, 65 Me. 426; 20 Am. Rep. 711.

A town was held not to be liable to its collector for the unauthorized act of its treasurer in levying a distress warrant against him. *Snow v. Brunswick*, 71 Me. 580.

The payee of a promissory note given by the treasurer of a town not authorized by statute to issue negotiable paper, was held not entitled to recover. *Persons v. Monmouth*, 70 Me. 262.

Towns bounded by the center of a highway cannot be jointly indicted for a defect therein. *State v. Thomaston*, 74 Me. 198.

Where one paid a tax a second time to get released from arrest, the town was held not to be liable for the arrest, nor for the money while in the hands of the collector; the taxpayer's remedy was against the collector as a trespasser. *Liberty v. Hurd*, 74 Me. 101.

A town was held not liable to pay

money, for money borrowed without authority by the selectmen, on a town order to pay an outstanding debt of the town. *Lincoln v. Stockton*, 75 Me. 141.

A town was held to remain liable upon a debt, notwithstanding the creditor's acceptance of the note of the town treasurer, believing it to bind the town. *Atkinson v. Minot*, 75 Me. 189.

In *Massachusetts*, in general, to hold a municipality liable for unlawful acts of its officers done *colore officii*, authorization or ratification must be shown. *Thayer v. Boston*, 19 Pick. (Mass.) 511; 31 Am. Dec. 157.

Where three non-residents were appointed by the town as a "committee" to designate the location of a proposed meeting-house, it was held that a designation by only two was insufficient to bind the town. *Damon v. Granby*, 2 Pick. (Mass.) 345.

Further, as to the power of a committee to bind the town, see *Keys v. Westford*, 17 Pick. (Mass.) 273; *Hunneeman v. Grafton*, 10 Met. (Mass.) 454; *Upjohn v. Taunton*, 6 Cush. (Mass.) 310.

The selectmen cannot bind a town beyond the express statutory sphere of their official duty. In 1814, British soldiers took possession of Castine, and threatened violence unless their demand for cattle was complied with. An inhabitant, at the request of the selectmen, furnished a yoke of oxen. It was held that the town was not liable. And it was doubted if, even upon a town vote to indemnify him, a tax to pay for the sacrifice would be legal; his demand affecting the inhabitants in their individual, and not in their corporate capacity. *Haliburton v. Frankfort*, 14 Mass. 214.

Further, upon the rule that a town can be bound only within scope of purposes of incorporation, see *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Norton v. Mansfield*, 16 Mass. 48; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Anthony v. Adams*, 1 Met. (Mass.) 284.

The rule of *respondent superior* applied; and a town was held liable for the washing away of an abutter's land through negligence of a servant of the selectmen acting as its agent in replacing a bridge. *Hawks v. Charlemont*, 107 Mass. 414, *distinguishing* *Barney v. Lowell*, 98 Mass. 570.

As to the indictability of a town for a defective highway, see *Com. v. Taunton*, 16 Gray (Mass.) 228.

A town is not liable for the selectmen's omission to draw on the town treasurer, under *Massachusetts* Stat. (1859), ch. 225, for loss of sheep killed by dogs. *Chenery v. Holden*, 16 Gray (Mass.) 125.

An expenditure by a town is legal if the primary object be to subserve a public purpose, although it also involves, as an incident, an expense which, standing alone, would not be lawful; e. g., the fitting up of rooms in a market house for rental. *Spaulding v. Lowell*, 23 Pick. (Mass.) 71. Followed in the Barre town-hall case. *Bates v. Bassett*, 66 Vt. 530.

Acceptance of a report of a town committee appointed to select a site and procure plans and estimates for a schoolhouse, was held not to ratify its doings in procuring services of an architect. *Brown v. Melrose*, 155 Mass. 587.

A town is liable to an abutter for damages for the negligence of a servant of the selectmen, in their construction of a highway pursuant to a town vote, acting as agents rather than as officers. *Deane v. Randolph*, 132 Mass. 475.

A lamplighter was held not to be such a servant or agent of the town as to preclude his recovering for injuries caused by a defective highway. *Eaton v. Woburn*, 127 Mass. 270.

After the owner has accepted the indemnity, under *Massachusetts* Stat. (1869), ch. 237, for land taken for a gravel and clay pit, he cannot insist on any informality in the selectmen's proceedings in laying out the land. *Hatch v. Hawks*, 126 Mass. 177.

A town was held not to be liable for a trespass committed by road commissioners *de facto*. *Clark v. Easton*, 146 Mass. 43.

A town was held not liable for damages to an abutter's cellar from percolation from a catch-basin constructed by the highway surveyor. *Kennison v. Beverly*, 146 Mass. 467.

Authority of the selectmen to alter the location of a private way, was held not to bind the town by an acceptance of a revocable license from a railroad corporation to place the way on its land. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325.

In *Michigan*, as to a municipality's liability for the consequences of its officers' negligence, the trend of adjudication is in favor of the dissenting opinion of Judge Cooley in *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep.

450. See review of cases in *Detroit v. Osborne*, 135 U. S. 492.

A township is not liable for illegal proceedings of the drain commissioner. *Taylor v. Avon Tp.*, 73 Mich. 604.

In *Michigan*, an individual may sue to enjoin *ultra vires* acts of a municipality injuriously affecting him as taxpayer. *Alpena v. Kelley*, 97 Mich. 550.

A township is not accountable for money illegally levied for drain taxes; the drain commissioners are not its agents. *Dawson v. Aurelius Tp.*, 49 Mich. 479.

A newspaper cannot recover for printing the ordinances of a village, unless authorized by its legislative body. *Thornton v. Sturgis*, 38 Mich. 639.

License money due a township, but wrongfully paid to a village by the county treasurer, may be deducted by him from license money subsequently accruing to the village. *Grosse Point v. Wayne County Treas.*, 85 Mich. 44.

The supervisor is not such an agent of the town as to render it liable for his errors of judgment. *Davis v. Kalamazoo*, 1 Mich. N. P. 16.

A town was held not bound to reimburse a supervisor his expenses of a *quo warranto* suit for intrusion of a claimant to the office. *People v. Bingham Tp.*, 32 Mich. 492.

In *Minnesota*, a town is liable to an adjacent landowner for damage caused by acts of its supervisors, done within the scope of their authority, in opening and working highways. *Peters v. Fergus Falls*, 35 Minn. 549, *citing* *Gilman v. Laconia*, 55 N. H. 130; 20 Am. Rep. 175; *Haynes v. Burlington*, 38 Vt. 350; *McClure v. Red Wing*, 28 Minn. 186; *Blakely Tp. v. Devine*, 36 Minn. 53, *citing* *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Pye v. Mankato*, 36 Minn. 373.

In *Mississippi*, the mayor of a town is not liable for the increased face value of warrants drawn upon its treasury, which after their issuance, the clerk of its council had fraudulently raised, although the neglect by its officers to draw lines through the spaces, enabled the alteration to be made so skillfully as to prevent detection by *bona fide* purchasers. *Chandler v. Bay St. Louis*, 57 Miss. 326. The mere fact that a municipal officer's act was done *colore officii*, will not render the municipality liable. *Sherman v. Grenada*, 51 Miss. 186.

For the requisites of a garnishment,

under *Mississippi Code* (1880), § 1832, of a municipality, in an attachment in chancery, see *Dollman v. Moore*, 70 Miss. 267.

In *Missouri*, a municipality is not answerable in damages for the negligent acts of its officers in executing such powers as are conferred for the public good. *Jefferson County v. St. Louis County*, 113 Mo. 619.

The laying of a railway track in a street on grade is not unconstitutional as damaging abutters without compensation. *Gaus & Sons Mfg. Co. v. St. Louis, etc., R. Co.*, 113 Mo. 308.

As to the liability of a municipality for damages from a change of grade, see *Carson v. Springfield*, 53 Mo. App. 289.

In *New Hampshire*, a town was held not to be liable for damages caused by work of its selectmen in constructing a sewer, under supposed authority of a town vote. *Lemon v. Newton*, 134 Mass. 476.

A town was held not liable for an injury from negligence of its officers in removing a flagstaff not owned by the town. *Wakefield v. Newport*, 60 N. H. 374.

Original want of authority in a town officer to contract for the building of a new highway, was held not to exonerate the town from liability to an abutter for damages from its improper construction, accruing after allowing it to be left open for public travel. *Carpenter v. Nashua*, 58 N. H. 37.

A town was held not to be bound by a contract by one of the selectmen, not assented to by the others, to give the holder of a note a year's notice when the board should wish to pay it. *Strafford v. Welch*, 59 N. H. 46.

Neither the town treasurer nor the selectmen can bind the town by making or ratifying an unauthorized loan of its money. *Holderness v. Baker*, 44 N. H. 414.

As to presumptions against a town from acts of its officers, *i. e.*, the selectmen of one town presenting an account to those of another for medical attendance upon a pauper, see *Glidden v. Unity*, 33 N. H. 571.

Towns are chargeable for the support of prisoners committed to jail for the violation of ordinances. *Strafford County v. Somersworth*, 38 N. H. 21.

A town is liable for the repair of a bridge dedicated to the public use, though erected by individuals. *State v. Campton*, 2 N. H. 513.

A town's voting to raise money to

purchase land for a courthouse, and appointing a committee to apply to the legislature to have courts held there one term annually, were held to entitle a member thereof to compensation for services and expenses, whether the vote was legal or illegal. *Batchelder v. Ep- ping*, 28 N. H. 354.

A separate penalty does not accrue for each intersection of roads at which the town has neglected to erect guide-posts. *Clark v. Lisbon*, 19 N. H. 286.

In *New Jersey*, the township, and not the collector, is liable for a misappropriation of money to cover a deficit of the preceding year, if this was not directed by the township committee. *State v. Mathe*, 51 N. J. L. 216. *Mandamus* lies to compel a township committee to pay over damages for injury to animals from dogs, without showing assessment or collection. *State v. Neptune Tp.*, 52 N. J. L. 487.

In *New York*, a town is not liable for the mistake of its assessors or collectors, they not being its corporate agents. *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120. A municipality was held not to be liable for a personal injury from its neglect to prevent swine from running at large, contrary to its ordinance. *Levy v. New York*, 1 Sandf. (N. Y.) 465. *Compare*, as to injury sustained from a cannon discharge at the Mexican war mass meeting, *Boylard v. New York*, 1 Sandf. (N. Y.) 27; also from an injudiciously planned sidewalk, *Urquhart v. Ogdensburg*, 91 N. Y. 67; from a defective dry retaining wall. *Watson v. Kingston*, 114 N. Y. 88. A town was held estopped to deny its liability for a debt contracted by its supervisor, apparently, but not actually, within the scope of his powers. *Gifford v. White Plains*, 25 Hun (N. Y.) 606. A town was held liable to reimburse expenditures in good faith made by its agent or trustee in selling its bonds in aid of a railroad, although they had been adjudged invalid. *Lyons v. Chamberlin*, 25 Hun (N. Y.) 49. A town was held not to be bound by representations of its officers as to their compliance with the statutory prerequisites of a town loan. *Starin v. Genoa*, 23 N. Y. 439. One who is a taxpayer and resident of the town, may maintain an action in its behalf to compel the county treasurer to purchase its bonds to be canceled. *Clarke v. Sheldon*, 10 N. Y. Supp. 357; 57 Hun (N. Y.) 586. In *North Carolina*, no inhabitant's

property can be held for any liability of the municipality, except in case of special bond, or of fraud. *North Carolina Code* (1883), § 3821.

In *Ohio*, where the township trustees have, in good faith, rejected a physician's claim for relief of the poor, no action lies against the township therefor under *Ohio Rev. Stat.* (1890), § 1494. *Elizabeth Tp. v. White*, 48 *Ohio St.* 577. His written notice, if given within three days, relates back. *Urbana Tp. v. Houston*, 2 *Ohio Cir. Ct. Rep.* 14.

In *Pennsylvania*, a township is not liable to reimburse a supervisor for a penalty incurred by his neglect of duty. *Benton Tp. v. Kennedy*, 2 *Luz. Leg. Obs. (Pa.)* 316. A borough was held not to be liable for a personal injury from its police officer's neglect to prevent a crowd from discharging a cannon therein. *Norristown v. Fitzpatrick*, 94 *Pa. St.* 121; 39 *Am. Rep.* 771.

A landowner cannot recover of a township not invested with the right of eminent domain, damages from the opening of a public road. *Wagner v. Salzburg Tp.*, 132 *Pa. St.* 636.

A township cannot be bound by an agreement by one of several supervisors to reimburse a laborer, if he breaks his plough while mending a public road. *Somerset Tp. v. Parson*, 105 *Pa. St.* 360.

One town was held liable to another for one-half the reasonable expense of building a necessary bridge over a boundary stream. *Pottsville Borough v. Norwegian Tp.*, 14 *Pa. St.* 543.

In *Tennessee*, an abutting lot owner who does not own the fee in the street, cannot recover of the municipality, damages from the proper grading and use thereof by a railroad company. *Iron Mountain R. Co. v. Bingham*, 87 *Tenn.* 522.

In *Vermont*, the doctrine of *respondet superior* was held not to apply, and a village was held not to be liable where a personal injury resulted from an act of its street commissioner not within the scope of his employment, namely, his careless piling of surplus drain tiles, not corporate property. *Palmer v. St. Albans*, 60 *Vt.* 427.

A town was held not to be responsible for the act of one of the selectmen, misinforming a claimant as to the legal time of notice of injury from a highway defect. *Gregg v. Weathersfield*, 55 *Vt.* 385.

Where a claimant of damages from a highway defect was misled by a selectman unofficially, as to the time of pre-

liminary notice, and the town voted to pay \$200, it was held that he could not recover, if not stating in his offer of evidence that he forebore to sue, relying on the town's promise to pay. *Gregg v. Weathersfield*, 55 *Vt.* 385. Admissions of selectmen, not qualifying or connected with any official act, cannot bind the town. *Tower v. Rutland*, 56 *Vt.* 28. Under the statutory requirement that a town "shall be liable to make good all damages," a joint action on the case lies against a town and the town clerk for his official default. *Lyman v. Windsor*, 24 *Vt.* 575. An action lies against a town, though after the death of its constable, for his default. *Martin v. Wells*, 43 *Vt.* 428.

Municipal authorization to construct electric-light wires, was held to give a vested right not to be infringed by a company under a later contract. *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 *Vt.* 377.

As to a town's liability to reimburse a selectman's payment of a town order, see *Burnham v. Strafford*, 53 *Vt.* 610.

An incorporated village was held not liable for injuries from the negligence of an engineer of the fire department in thawing out a hydrant. *Welsh v. Rutland*, 56 *Vt.* 228; 48 *Am. Rep.* 762, citing *Dill. on Mun. Corp.*, § 774.

"When a town, liable to keep in repair a highway or bridge, does not do so, it may be indicted for such neglect, by the grand jury of the county; and may be fined at the discretion of the court, whether any special damage has been entertained or not." *Vermont Rev. L.* (1880), § 3112.

A town is not liable for oral statements made by its clerk; nor are they evidence of what is or is not upon the town records. *Jarvis v. Barnard*, 30 *Vt.* 492.

As to when a town is bound by representations of its agent—*e. g.*, an overseer of the poor—see *Burlington v. Calais*, 1 *Vt.* 391; 18 *Am. Dec.* 601.

A town is not liable for unlawful acts of its overseers of the poor, not within the scope of their authority. *Chelsea v. Washington*, 48 *Vt.* 610.

A town is not liable for the acts or defaults of the selectmen in their statutory duties as to infected persons. *White v. Marshfield*, 48 *Vt.* 20.

An authorized transaction by one of the selectmen—*e. g.*, promising an enlistment bounty—may be presumed to be the act of the majority, and bind the town. *Guyette v. Bolton*, 46 *Vt.* 228.

2. Upon Contracts; Town Bonds.—The liability of municipal corporations in general, upon contracts, express or implied, and that of towns in certain special matters, have already been adverted to.¹ Some statutory liabilities, and adjudications thereon, are now to be noted.²

A town may, by ratification by its officers, be rendered chargeable upon a contract made in non-compliance with the statute thereon; *c. g.*, as to procedure in the town's purchase and sale of liquors. *Topsham v. Rogers*, 42 Vt. 189.

As to a town's liability for acts of its constable, see *Barber v. Benson*, 9 Vt. 171; *Bramble v. Poultney*, 11 Vt. 208; *McGregor v. Walden*, 14 Vt. 450; *Bank of Middlebury v. Rutland*, 33 Vt. 450.

As to the liability of a town for failure of its constable duly to serve a process, see *Rogers v. Fairchild*, 36 Vt. 641.

As to the apportionment between towns, of the expense of a highway, see *Rockingham v. Westminster*, 24 Vt. 288.

As to a town's duty to provide a by-way around a railroad obstruction of the highway, see *Batty v. Duxbury*, 24 Vt. 155.

A statutory requirement that towns shall repair injuries to bridges "as soon as may be," means dispatch commensurate with the importance of the road, the magnitude of the work, and the opportunity of procuring materials. *Briggs v. Guilford*, 8 Vt. 267.

The statutory limit of a load to 10,000 pounds, means exclusive of the vehicle in the liability of a town for highway insufficiency. *Howe v. Castleton*, 25 Vt. 162.

A town was held liable to indictment for neglect to open a highway alongside of a railroad, as ordered by the county court. *State v. Vernon*, 25 Vt. 244. So, also, for not erecting a bridge ordered by the road commissioners. *State v. Whittingham*, 7 Vt. 391. As to indictability for insufficiency of a new road on the discontinuance of an old one, see *State v. Fletcher*, 13 Vt. 124; *State v. Alburgh*, 23 Vt. 262. A town is not indictable for a nuisance—*c. g.*, a stagnant pool—not created by itself or its agents. *State v. Burlington*, 36 Vt. 521.

In *Washington*, indebtedness for water, sewerage and light purposes, does not constitute a part of the general indebtedness, but is authorized, under *Washington Const.*, art. 8, § 6, in excess of the five per cent. of munici-

pal indebtedness permitted for general purposes. *Austin v. Seattle*, 2 Wash. 667. Compare *Baker v. Seattle*, 2 Wash. 576.

In *Wisconsin*, the facts that one of the town board, in the presence of another, told the path-master to render a town road fit for travel, and that the board allowed a portion of his claim therefor, were held not to amount to a contract making the town liable for the balance. *Deichsel v. Maine*, 8 Wis. 553.

Where the township school system exists, a town is not liable to an action on an order drawn by the town board of school directors on the town treasurer. *Miller v. Jacobs*, 70 Wis. 122.

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1080; MUNICIPAL SECURITIES, vol. 15, p. 1204; MANDAMUS, vol. 14, p. 192.

2. See BRIDGES, vol. 2, p. 560; DRAINS, vol. 6, p. 23; HIGHWAY, vol. 9, p. 376; POOR AND POOR LAWS, vol. 18, p. 813; PUBLIC OFFICERS, vol. 19, p. 378; SCHOOLS, vol. 21, p. 748; STREETS, vol. 24, p. 1; TAXATION, vol. 25, p. 5.

In *Alabama*, the invalidity of contracts, because *ultra vires*, is more strictly maintained in favor of municipal, than of private corporations; the contract must be clearly within the scope of the objects and purposes of incorporation. Thus, power to build wharves does not import power to lease them without charge or revenue; and such lease is void. *Mobile v. Moog*, 53 Ala. 561, citing *Anthony v. Adams*, 1 Met. (Mass.) 286. So, also, was held to be invalid its purchase of land for an association to hold annual fairs thereon. *Eufaula v. McNab*, 67 Ala. 588; 42 Am. Rep. 118.

In *Arkansas*, no officer can bind a town by his declarations or admissions, or, without its authority, make contracts therefor. *Halbut v. Forrest City*, 34 Ark. 246. Statutory authority merely to subscribe, was held not to render valid town bonds issued in payment of railroad stock. *Dodge v. Memphis*, 51 Fed. Rep. 165, citing *Nashville v. Ray*, 19 Wall. (U. S.) 468; *Hitchcock v. Galveston*, 96 U. S. 350;

Little Rock v. Merchants' Nat. Bank, 98 U. S. 198; Merrill v. Monticello, 138 U. S. 673.

In *Connecticut*, a statement in the record of a town meeting that it was "legally warned," is not sufficient evidence that the borrowing was specified in the notice of the town meeting so as to render the town liable on its treasurer's note therefor. Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121. A town voted to issue, in aid of a railroad, bonds payable in twenty years, or, at the option of the town, in ten. The officials executing them inadvertently omitted the optional clause. A majority of the court held that one taking them with knowledge of the facts, could not successfully contest a suit for their correction, nor complain of the town's delay of two years in instituting the suit. Essex v. Day, 52 Conn. 483. A town at a meeting inadequately warned, voted to guarantee bonds on certain conditions, and afterwards at a meeting regularly called, voted to let the conditions remain. The town clerk recorded the votes as having been legally taken. A majority of the court held that the town was not estopped to dispute the legality of the guaranty. Brooklyn Trust Co. v. Hebron, 51 Conn. 22. The *bona fide* assignee of a note given by a town for the payee's enlistment, was held entitled to recover, notwithstanding the payee's desertion. Terrell v. Colebrook, 35 Conn. 188. Where a town offered a sum to every citizen drafted into the service of the *United States*, "and accepted by the board of examiners, who shall enter said service or procure an accepted substitute," it was held that one who was drafted, but, before examination, procured a substitute that was accepted, could not recover the sum. Reed v. Sharon, 35 Conn. 191. Town bonds issued in aid of a railroad, were held to be an "investment" therein, within a statute limiting the amount to be guaranteed to the amount so invested. Douglas v. Chatham, 41 Conn. 211.

In the *Dakotas*, as against *bona fide* holders of township bonds reciting that the conditions precedent to the issuance had been complied with, it is sufficient to estop from denial thereof, that the officers issuing had full control, and to declare that the bonds were issued in pursuance of a statute specifying it. Coler v. Dwight School Tp. (N. Dak. 1893), 55 N. W. Rep. 587.

As to the requisites of issuance of

school township bonds, see *Prairie School Tp. v. Haseleu* (N. Dak. 1893), 55 N. W. Rep. 938.

In *Georgia*, as to municipal authorization to issue bonds in aid of a railroad, see *Griffin v. Inman*, 57 Ga. 370.

As to requisites of the notice for the issuance of municipal bonds under *Georgia Code*, § 5081, see *Athens v. Hemerick*, 89 Ga. 674.

A municipal contract for gas for twenty years, each year's supply to be paid for quarterly during the year, was held to be operative only so long as neither of the parties repudiate it. *Cartersville Imp., etc., Co. v. Cartersville*, 89 Ga. 683.

A municipality cannot, as against a *bona fide* holder of its negotiable paper, set up that the statute enabling issuance thereof had not been complied with. *Danielly v. Cabaniss*, 52 Ga. 211.

As to the requisites of procedure in issuing township bonds, see *Bowen v. Greensboro*, 79 Ga. 709.

As to requisites of procedure in issuing bonds of *Illinois* towns or townships, see *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 103; *Kankakee County v. Etna L. Ins. Co.*, 106 U. S. 668; *Pana v. Bowler*, 107 U. S. 529; *People v. Granville*, 104 Ill. 285; *Jacksonville, etc., R. Co. v. Virden*, 104 Ill. 339; *Aroma v. State Auditor*, 15 Fed. Rep. 843; *Prairie v. Lloyd*, 97 Ill. 179; *WindSOR v. Hallett*, 97 Ill. 204; *Douglas v. Niantic Sav. Bank*, 97 Ill. 228; *Enfield v. Jordan*, 119 U. S. 680; *Oregon v. Jennings*, 119 U. S. 74; *Concord v. Robinson*, 121 U. S. 165; *People v. Getzendauer*, 137 Ill. 234; *Springfield, etc., R. Co. v. Cold Spring Tp.*, 72 Ill. 603; *Chicago, etc., R. Co. v. Coyer*, 79 Ill. 373; *East Lincoln v. Davenport*, 94 U. S. 801; *Force v. Batavia*, 61 Ill. 99; *People v. Cline*, 63 Ill. 394.

As to the requisites of a petition for *mandamus* to compel town auditors to allow a claim, see *People v. Mount Morris*, 145 Ill. 427.

In *Indiana*, a party seeking to establish rights against a township under its trustee's contract—*e. g.*, for lease of congressional township lands—must show affirmatively that the antecedent statutory requirements have been complied with by him. *Anderson v. Prairie School Tp.*, 1 Ind. App. 34. As to township non-liability for fees of attorneys employed by the county board, see *Shirts v. Nobleville Tp.*, 122 Ind. 580. To bind the township for school supplies, they must have been de-

livered. *Litton v. Wright School Tp.*, 127 Ind. 81, *citing* *Grimsley v. State*, 116 Ind. 130. A township is not liable on a debt certificate fraudulently issued by the trustee in a conspiracy to overcharge for lightning-rods supplied to a school building. *Boyd v. Mill Creek School Tp.*, 124 Ind. 193. Under *Indiana* Rev. Stat., § 4146, the trustees are the sole judges of the right to purchase school land. *Craig School Tp. v. Scott*, 124 Ind. 72. A trustee cannot bind his township by contracting a debt in excess of the fund on hand, to which the debt is chargeable, and of the fund from the annual tax. *Boyd v. Black School Tp.*, 123 Ind. 1, 600; *Roschoom v. Jefferson School Tp.*, 122 Ind. 377. The party contracting must take notice of the limit of the trustee's power to bind the township. *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213.

The liabilities of the civil township are distinct from those of the school township of the same territory. *Carmichael v. Lawrence*, 47 Ind. 554; *McLaughlin v. Shelby Tp.*, 52 Ind. 114; *Jackson Tp. v. Home Ins. Co.*, 54 Ind. 184; *Wingate v. Harrison School Tp.*, 59 Ind. 520; *Utica Tp. v. Miller*, 62 Ind. 230; *Harrison Tp. v. McGregor*, 67 Ind. 380.

In a municipal contract for a supply of gas or water, twenty-five years is not an unreasonable term. *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114.

A note in addition to the signature "Trustees of S. Township," was held to bind the township, and not the trustee individually. *State v. Helms* (Ind. 1893), 35 N. E. Rep. 893.

A school township is *prima facie* liable upon the trustee's certificate for necessary school supplies. *Noble School Furn. Co. v. Washington School Tp.*, 4 Ind. App. 270.

General authority, under the *Indiana* statute to consolidate railroad companies, was held to import a transfer to the new company of the township's obligation upon subscription to the stock. *Poke v. Lake County*, 51 Fed. Rep. 769.

The *Indiana* Act of 1887, authorizing town trustees to issue bonds and levy "for general purposes," was held not to authorize a levy to pay a judgment for interest on bonds issued under the acts of 1852. *U. S. v. Cicero*, 50 Fed.

Rep. 147, *affirming* 41 Fed. Rep. 83, and *citing* *U. S. v. Macon County*, 99 U. S. 582.

As to the requisites of procedure in issuing town bonds, see *Clark v. Noblesville*, 44 Ind. 83; *Merrill v. Monticello*, 14 Fed. Rep. 628.

As to what condition—*e. g.*, as to the location of a depot, etc.—will or will not avoid a township subscription in aid of a railroad, see *Jager v. Doherty*, 61 Ind. 528. A taxpayer may have enjoined a town's unauthorized issuance of bonds. *Winamac v. Huddleston*, 132 Ind. 217.

In *Iowa*, a township clerk's order to a road supervisor, in pursuance of a settlement with the township trustees, made payable out of the assessment of a particular year, is payable out of the general township fund, and *mandamus* lies to enforce it. *Tobin v. Emmetsburg*, 52 Iowa 81.

Payment of road orders must be made, not out of the general fund, but each must be confined to the particular district. *Bradley v. Love*, 76 Iowa 397.

As to what will put a transferee upon inquiry as to the validity of district bonds, see *Bates v. Riverside School Dist.*, 25 Fed. Rep. 192; *Nesbit v. Riverside School Dist.*, 25 Fed. Rep. 635.

As to the procedure in issuing town bonds in aid of a railroad, see *Harwood v. Quinby*, 44 Iowa 385.

In *Sioux City, etc., R. Co. v. Osceola County*, 45 Iowa 175, Day, J., said: "When a bond issued in discharge of a judgment is placed upon the market, a purchaser who has no intimation of anything affecting its validity has a right to presume that the board of supervisors have been mindful of their interest and their duty, and that all available defenses have been presented and passed upon." Judge Brown, in his dissenting opinion in *Doon Tp. v. Cummins*, 142 U. S. 366, 380, cites this with approval, as also approved in *Sioux City, etc., R. Co. v. Osceola County*, 52 Iowa 26; *Miller v. Nelson*, 64 Iowa 458; *Chaffee County v. Potter*, 142 U. S. 355; *Powell v. Madison*, 107 Ind. 106.

In *Kansas*, a township may be estopped by its course of dealing with a railroad company, to deny the regularity of an issuance of bonds to pay its subscription to such road. *Brown v. Milliken*, 42 Kan. 769; *Kansas City, etc., R. Co. v. Rich Tp.*, 45 Kan. 275; *Hutchinson, etc., R. Co. v. Kingman County*, 48 Kan. 70. As to the limit of

such township aid in the act of 1885, see *Chicago, etc., R. Co. v. Osage County*, 38 Kan. 597.

An act authorizing a certain township to vote bonds to reimburse citizens for advances to build a courthouse, was held to be constitutional. *Linn County v. Snyder*, 45 Kan. 636. As to the requisites of town bonds, see *Montgomery v. St. Mary's Tp.*, 43 Fed. Rep. 362. As to *mandamus* to compel a levy to meet a bonded debt, see *Cherokee County v. Wilson*, 109 U. S. 621.

The fact that a township has issued bonds up to the limit of its power, does not preclude a city of the third class, formed from a portion thereof, to issue bonds in payment of stock subscribed in aid of a railroad. *Iola v. Merriam*, 46 Kan. 49.

As to the requisites of bonds in aid of improvement companies under *Kansas* Law of 1887, ch. 114, see *People's Nat. Bank v. Pomona*, 48 Kan. 55.

The *Kansas* Act of 1881, ch. 170, providing for the appointment of commissioners to refund the bonded indebtedness of Oswego township, has been held to contravene a constitutional inhibition of a special law where a general one can be applied. *Travelers' Ins. Co. v. Oswego Tp.*, 55 Fed. Rep. 361.

As to the power of townships under the *Kansas* laws of 1872 and 1874 to issue bonds for municipal indebtedness, see *Salt Creek Tp. v. King Iron Bridge, etc., Co.*, 51 Kan. 520.

As to school bonds under the law of 1891, see *Topcka Board of Education v. Welch* (Kan. 1893), 33 Pac. Rep. 654.

Where railway-aid town bonds recite the taking of each step required by the act authorizing their issuance, the town is estopped to allege their invalidity on any ground except that they were issued in violation of some constitutional or statutory requirement. *Washington v. Coler*, 51 Fed. Rep. 362, citing *Chaffee County v. Potter*, 142 U. S. 355; *Coloma v. Eaves*, 92 U. S. 491; *Lake County v. Graham*, 130 U. S. 674.

In the *Kansas* Act of 1876, ch. 107, § 14, the words, "principal and interest accruing from time to time by the terms of the bonds," were held not to require that all bonds should provide for annual payment on the principal. *Washington Tp. v. Coler*, 51 Fed. Rep. 362.

Township bonds purporting on their face to be issued under the *Kansas* special act of 1872, ch. 158, cannot be

deemed to have been issued under the general act. In the absence of statutory requirement thereof, the bonds gain no validity by the state auditor's indorsement. *Crow v. Oxford*, 119 U. S. 215. Compare *McClure v. Oxford Tp.*, 94 U. S. 429.

The burden of proof is on those attacking bonds which appear valid on their face. *State v. School Dist.*, 34 Kan. 237.

A township vote to provide for issuing bonds of \$500 each, was held not avoided by the fact that the legal appropriation could not be exactly so divided. *Turner v. Woodson County*, 27 Kan. 314.

Want of full compliance with the statutory requirement of thirty days' notice of the election, to authorize the issuance of town bonds, was held to render them void so that no person could be an innocent holder. *George v. Oxford*, 16 Kan. 72.

What conditions—*c. g.*, as to a location of depot, etc.—will or will not avoid a township subscription in aid of a railroad, are set forth in *Atchison, etc., R. Co. v. Jefferson County*, 21 Kan. 309.

A township was held to be estopped by recitals in its bonds to insist against a *bona fide* holder, that they were issued in excess of the proportion of the taxable property required by the *Kansas* Enabling acts of 1870 and 1872; or that the railroad had become consolidated. *Wilson v. Salamanca*, 99 U. S. 499.

A *bona fide* holder of township bonds was held not bound to look beyond their recitals and the *Kansas* Enabling act of 1870. *Marcy v. Oswego Tp.*, 92 U. S. 637.

Under the *Kansas* statute declaring all custom grist-mills to be "public mills," they are a public use in aid of which the town thereby benefited may issue bonds, under the Enabling act as to internal improvements. *Burlington Tp. v. Beasley*, 94 U. S. 310.

As to the requisites of procedure in issuing township bonds, see *Montgomery v. St. Mary's Tp.*, 43 Fed. Rep. 362.

In *Kentucky*, an ordinance may properly give a municipal officer discretion to sell the bonds at a lower rate of interest than that fixed therein. *Frantz v. Jacob*, 88 Ky. 525.

As to what constitutes authorization or ratification of a municipal officer's employment of counsel, see *Owensboro v. Weir* (Ky. 1893), 24 S. W. Rep. 115.

In *Louisiana*, a contract need not be

made with a municipality *co nomine*. It will be binding thereon, if it recites authorization therefrom. *Schwartz v. 32 Flatboats*, 14 La. Ann. 243.

A town authorized by a special act to issue bonds, must not contravene the inhibition in *Louisiana Rev. Stat.*, § 2448, against exceeding the means provided to pay them; its liability does not extend to the excessive issuance. *Oubre v. Donaldsonville*, 33 La. Ann. 386; *Johnson v. Donaldsonville*, 33 La. Ann. 366.

Validity of claims against a town, in settlement whereof its bonds were issued, cannot be questioned in a suit on the bonds. *Dugas v. Donaldsonville*, 33 La. Ann. 668. And this, even though prescription had run on original claims when the bonds were issued. *Maurin v. Donaldsonville*, 33 La. Ann. 671.

In *Maine*, a town that has accepted a fund bequeathed in trust for an educational or other charitable purpose, is responsible for its safety, and liable for interest, if using it otherwise. *Bangor v. Beal*, 85 Me. 129; *Ayer v. Bangor*, 85 Me. 511.

The date of maturity of a town order is that specified in the specific vote, though not recited in the order. *Willis v. French*, 84 Me. 593.

A town order once paid cannot be again negotiated in payment of other debts owing by the town. *Mitchell v. Albion*, 81 Me. 482.

The payment of its debt with money hired by its officers without its authority or ratification will not charge the town. *Hurd v. St. Albans*, 81 Me. 343.

One cannot recover upon a town order, without showing agency in fact of the drawee or acceptor. *Sturtevant v. Liberty*, 46 Me. 457.

As to the rights of indorsees of town orders, see *Emery v. Mariaville*, 56 Me. 315.

The inhabitants' use of a highway bridge, was held not to import a promise by the town to pay for building it. *Knowlton v. Plantation No. 4*, 14 Me. 20.

Proceedings of a town treasurer and selectmen, were held to be conclusive as to the fulfillment of prerequisites of issuance of town bonds. *Deming v. Houlton*, 64 Me. 254; 18 Am. Rep. 253.

A town is held to be bound by a contract made by a minority of its committee and ratified by a majority. *Hanson v. Dexter*, 36 Me. 515.

As to the prerequisites of recovery against a town or plantation for money lent in pursuance of a vote to pay mil-

itary bounties, see *Bessey v. Unity*, 65 Me. 342.

A town authorized to issue bonds, has been held equitably estopped to plead irregularities therein. *Shurtleff v. Wiscasset*, 74 Me. 130.

As to the requisites of procedure in issuing town bonds, see *Lane v. Embden*, 72 Me. 354; *Stevens v. Anson*, 73 Me. 489.

In *Massachusetts*, in order to render a municipal corporation liable as trustee (or garnishee), the contract must be complete and the debt fixed upon. *Hadley v. Peabody*, 13 Gray (Mass.) 200. Compare *Potter v. Cain*, 117 Mass. 238. A town's adoption of the report of a committee appointed to supervise the building of a schoolhouse, was held not to render the town liable for expenditures in excess of the limitation; it not appearing that the report informed the town of the excess. *Brown v. Melrose*, 155 Mass. 587.

The power under *Massachusetts Stat.* (1855), ch. 394, to subscribe for railway stock, was held to import power to issue negotiable bonds. The town committee may deliver the bonds at one time instead of by installments. *Com. v. Williamstown*, 156 Mass. 70.

A town is not liable as upon contract, to a house owner, for the unlawful seizure and occupation of his premises by the town board of health, as a small-pox hospital, without his leave. *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334.

A town appointed a committee to investigate a town claim against H. for certain pistols alleged to have been wrongfully disposed of, pending which investigation, H. deposited money with A., a member thereof, to hold until he explained the matter to the town, which money, without his authorization, the committee paid into the town treasury. It was held that on the town's vote to repay, H. could maintain an action against it for money had and received; moreover, that on A.'s death, the vote was admissible in evidence, and was not revocable by a subsequent vote to rescind it. *Hall v. Holden*, 116 Mass. 172.

Town officers' knowledge that one who had contracted to alter a highway had not completed the work within the stipulated time, and their failure to object to his continuing at it, was held to constitute a waiver on behalf of the town. *Snow v. Ware*, 13 Met. (Mass.) 42.

As to the liability of a town upon

its vote to pay a bounty for military enlistment, see *Shepard v. Turner*, 13 Allen (Mass.) 92; *Andrews v. Prouty*, 13 Allen (Mass.) 93; *Estey v. Westminster*, 97 Mass. 324; *Rand v. Worcester*, 98 Mass. 126; *Barker v. Chesterfield*, 102 Mass. 127.

As to a town's liability to one furnishing supplies upon an order of the overseer of the poor, see *Ireland v. Newburyport*, 8 Allen (Mass.) 73.

One who has contracted with a town is not affected by a rescission vote, whereof he had no notice. *Allen v. Taunton*, 19 Pick. (Mass.) 485.

For the requisites of procedure in issuing town bonds, see *Pearsons v. Ranellett*, 110 Mass. 120.

In *Michigan*, if a township bond does not show on its face authority to issue it, the holder takes it subject to the defense of entire illegality. *Bogart v. Lamotte Tp.*, 79 Mich. 294. Under *Michigan* Gen. Stat. (1882), § 1786—that the poor “shall be supported at the expense of the township”—the law raises an implied promise on the part of the township to furnish such support, and the township is liable for necessities furnished, after due notice to the supervisor that the person is a township charge, and his refusal, etc. *Eckman v. Brady Tp.*, 81 Mich. 70. But compare *McCaffrey v. Shields*, 54 Wis. 645. A township is liable to a physician employed by the board of health to treat a contagious disease. *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63.

Mandamus will not lie to compel the payment of township orders repudiated as outlawed, without a clear showing of their validity and consideration. *Avery v. Krakow Tp.*, 73 Mich. 622.

For the construction of divers local acts restricting the issuance of municipal bonds, see *Muskegon v. Gow*, 94 Mich. 453; *Tillotson v. Saginaw*, 94 Mich. 240.

A special statute (*Michigan* Local Acts (1889), No. 376) authorizing the issuance of township bonds to pay outstanding orders, is not unconstitutional for not requiring the assent of the electors, thus leaving it to the township board to determine their validity. *Boyce v. Atty. Gen'l*, 90 Mich. 314, 326.

In *Minnesota*, a party contracting is chargeable with notice of the restricted power of the town authorities therein. *Newbery v. Fox*, 37 Minn. 141. In *Montana*, so, also, as to statutory limitations upon the municipal corporate authorities. *Lebscher v. Custer County*, 9 Mont. 315.

A town is not liable on its bonds issued under the unconstitutional *Minnesota* Laws (1887), ch. 106, § 7, allowing issuance thereof in aid of a railroad. *Plainview v. Winona, etc.*, R. Co., 36 Minn. 505.

Under the *Minnesota* Town-Bond Law of 1878, the board may waive the issuance of stock to the town subsequently to the election authorizing the issuance of the bonds. *Finlayson v. Vaughn* (Minn. 1893), 56 N. W. Rep. 49.

Recitals in town bonds stating a compliance with the conditions precedent, have been held conclusive evidence in favor of the purchaser. *Marshall v. Elgin*, 3 McCrary (U. S.) 35.

For the requisites of procedure in issuing town bonds, see *State v. Highland*, 25 Minn. 355; *State v. Roscoe*, 25 Minn. 445.

In *Missouri*, a municipality whose trustees had, without any authorizing ordinance, ordered a fire-engine, was held not to be liable on any implied contract to pay, etc. *Schell City v. L. M. Rumsey Mfg. Co.*, 39 Mo. App. 264. As to the liability upon interpleader, etc., in equity, of a municipality to materialmen, creditors of an absconded contractor of a job upon a public building, the sureties of whom had completed it, see *St. Louis v. O'Neil Lumber Co.*, 42 Mo. App. 586. An ordinance making a water company “liable for all damages occasioned” by fire from an inadequate water supply, was held not to render privy to accruing rights and liabilities an insurance company compelled to pay consequent loss. *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118.

In *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444, in deciding that a municipality was not liable for the loss of a brewery through a fireman's negligence, the court, by Adams, J., said: “It was not the intention of the legislature, in conferring power on the city to establish a fire department, to render it responsible as an insurer for losses by fire. The power conferred was a legislative or discretionary power, which the city authorities might in their wisdom exercise or not. The creation of the fire department was not for the peculiar benefit of the corporation, but for the public. And the officers of this department, although appointed by the city, are public officers, and not agents of the city in the sense that renders the city liable for their acts or omissions of duty. The doc-

trine of '*respondet superior*' does not apply." So held, also, as to the neglect of municipal officers to abate a hogpen nuisance near a plaintiff's hotel. *Armstrong v. Brunswick*, 79 Mo. 319.

The *Missouri* Act of 1872, forbidding the officers to loan the credit of a municipality without the assent of two-thirds of the voters, is merely prohibitory and imports no power to loan with such assent; and the town bonds of Moberly, reciting such assent, are nevertheless void. *Jarrold v. Moberly*, 103 U. S. 580.

Where a *Missouri* Railroad law of 1868 provided for township subscriptions in aid of railroads to pass "through or near such townships," a town, after paying regularly for three years, interest on its bonds, was, as against a *bona fide* holder, held to be precluded from questioning that a road nine miles distant was "near." *Kirkbride v. Lafayette County*, 108 U. S. 208.

An action for money had and received for past-due coupons of unauthorized town bonds, was held to be an action on an implied contract within the *Missouri* Statute of Limitation to five years. *Morton v. Nevada*, 52 Fed. Rep. 350.

The *Missouri* constitutional inhibition of legislation authorizing "any county, city, or town" to become a stockholder, etc., was held to extend to a township; and a holder of coupons of bonds issued in payment, and containing recitals putting him on inquiry, was held not to be entitled to recover thereon. *Harshman v. Bates County*, 92 U. S. 569. But compare *Jordan v. Cass County*, 3 Dill. (U. S.) 185.

A town cannot set up against a *bona fide* holder of its bonds that it was not duly incorporated under the *Missouri* law. *Aller v. Cameron*, 3 Dill. (U. S.) 198.

Innocent holders of town bonds are held to have the burden of proof, that the vote at the election for their issuance complied with the statute. *Carpenter v. Lathrop*, 51 Mo. 483.

In *Montana*, where a statute imposes upon municipal corporate authorities a duty—*e. g.*; issuance of warrants or coupon bonds—and they fail to perform it, the law of *respondet superior* does not apply. *Territory v. Cascade County*, 8 Mont. 396. The clause in *Montana* Comp. Stat. (1887), p. 106, § 189—rendering liable to garnishment all "persons" having, etc.—includes municipal corporations. *Waterbury v.*

Deer Lodge County, 10 Mont. 515, citing *Wallace v. Lawyer*, 54 Ind. 501, and *distinguishing* the case of a direct execution, *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204. Whether the debt is sufficiently fixed and settled upon, is for the trial court to determine, under § 190.

In *Nebraska*, the township cannot, by neglect to levy the necessary taxes, escape its liability upon one's contract with the supervisor, to support its poor. *Waltham v. Mullall*, 27 Neb. 483.

In *Nebraska*, statutory authority to borrow money to pay for the sites, and to erect and furnish school buildings, was held not to import power to issue bonds to be bargained away and delivered to a contractor to erect and furnish a schoolhouse; nor the recitals to estop to defend a suit by an innocent purchaser for value before maturity. *State v. School Dist. No. 4*, 16 Neb. 182, *distinguishing* *State v. School Dist. No. 4*, 13 Neb. 82; *Gould v. Sterling*, 23 N. Y. 456.

In *New Hampshire*, the health officer cannot render the town liable for medicines, etc., furnished to inhabitants who are not paupers. *McIntire v. Pembroke*, 53 N. H. 462.

A town's receiving and appropriating liquors, knowing them to have been illegally purchased by its agent, was held to bind it as ratifying the agent's authority. *Backman v. Charlestown*, 42 N. H. 125.

A town, after ratifying an unauthorized payment made by its selectmen, and thereby obtaining its quota, was held not entitled to recover it back, either from the recruits or the selectmen. *Greenland v. Weeks*, 49 N. H. 472.

A town bond conditioned to perform an act unauthorized by law—*e. g.*, to build or maintain part of a bridge in another town—is void. *Concord v. Boscawen*, 17 N. H. 465.

In *New Jersey*, no action lies against a township to recover for work done on roads in advance of an appropriation, though one be afterwards made. Nor is the township bound by its committee's acceptance of an order of a road overseer in favor of a third person, directing payment of money to be appropriated in the future to a road district. *Wayne Tp. v. Cahill*, 49 N. J. L. 144. A suit lies on township bonds, although a special mode of payment is given by statute. *Morrison v. Bernards*, 36 N. J. L. 219. The restriction

(*New Jersey Rev.*, p. 1203, § 54), upon the issuance of township bonds only on certain conditions, does not apply where a lawful debt has already been incurred. *Union Tp. v. State*, 45 N. J. L. 182. Power in a township, under the *New Jersey Act of 1864*, to pay bounties to volunteers by issuance of its bonds, imports power in the township committee to execute the bonds. *Middleton v. Mullica Tp.*, 112 U. S. 433.

The requirement in *New Jersey Rev.*, p. 1203, § 54, as to the issuance of township bonds, applies only to optional incurrence of debt; not where a debt is already incurred and obligatory. *Union Tp. v. State*, 45 N. J. L. 182.

In an action on a township bond, the plaintiff may rely on the title of any prior *bona fide* holder for value. *Montclair v. Ramsdell*, 107 U. S. 147.

A *New Jersey* township was held to be estopped by recitals in its bonds, from setting up against a *bona fide* holder that the issuance was in excess of the amount authorized. *New Providence v. Halsey*, 117 U. S. 336.

Statutory authority of a township committee to order a tax to pay interest on township bonds, was held to import power to order a tax to pay interest on notes given in lieu of certain bonds matured. *State v. Smith*, 47 N. J. L. 473.

In *New York*, as to the issuance of new bonds and the cancellation of old ones, see *New York Sess. L.* (1892), p. 510.

As to the liability of a town under the Town-Bonding Act of 1869, ch. 907, and 1871, ch. 925, see *Cherry Creek v. Becker*, 123 N. Y. 161; *Hoag v. Greenwich*, 133 N. Y. 152. As to a town's right under the general railroad law of 1871, ch. 283, to have the sinking fund applied in payment of its bonds, see *Crowninshield v. Cayuga County*, 124 N. Y. 583; *Spaulding v. Arnold*, 125 N. Y. 194. Town bonds are not necessarily invalidated by illegality in the statutory provision for levying an assessment to pay them. *Horn v. New Lots*, 83 N. Y. 100. As to the requisites of a town's contract for a water supply, under the Act of 1889, ch. 369, see *Nicoll v. Sands*, 131 N. Y. 19.

Town bonds were held not to be invalidated by the holder's affixing seals omitted by the signers. *Armfield v. Solon*, 19 N. Y. Supp. 44; 64 Hun (N. Y.) 633.

Coupons of town bonds are held to partake of the character of commercial

paper, and to bear interest, though no agreement to pay compound interest be shown. *Williamsburgh Sav. Bank v. Solon*, 65 Hun (N. Y.) 166.

As to the right of issuance of new bonds to retire old ones, see *Poughkeepsie v. Quintard*, 65 Hun (N. Y.) 141.

As to prerequisite presentation of a claim to the village trustees, see *Mark v. West Troy*, 69 Hun (N. Y.) 442.

A town is liable to reimburse moneys in good faith advanced to it to pay an indebtedness, although the transaction was *ultra vires*. *Wells v. Salina*, 71 Hun (N. Y.) 559.

Although bonds issued by the commissioners under the Bonding Act of 1869, ch. 907, are void if made payable in twenty, instead of thirty, years, they may bind the town under the implied promise to repay the loan. *Hoag v. Greenwich*, 133 N. Y. 152.

Village bonds stolen and put on the market before issued, are held not binding on the village. *Germania Sav. Bank v. Suspension Bridge (Supreme Ct.)*, 26 N. Y. Supp. 98.

Annulment by the *New York* supreme court of an order of a county judge for execution by commissioners of town coupon bonds to a railway company, was held to render invalid the issuance. One suing on detached coupons could not recover against the town without establishing his *bona fide* ownership. The town would not be estopped by a judgment in his favor upon other coupons detached from the same bonds. *Stewart v. Lansing*, 104 U. S. 505, citing *Cromwell v. Sac County*, 94 U. S. 351.

The statutes of 1869 and 1871, providing for municipal bonds in aid of railways and an appropriation of taxes therefor, apply to both the original issue and the new bonds issued to retire them. *Barnum v. Sullivan County*, 137 N. Y. 179.

Further, as to the right of a town, village, or city issuing bonds in aid of a railway to apply taxes collected on the property of the railroad in the municipality in payment of the bonds, see *Oneida v. Madison County*, 136 N. Y. 269; *People v. Cayuga County*, 136 N. Y. 281; *Woods v. Madison County*, 136 N. Y. 403; *Ackerson v. Niagara County*, 72 Hun (N. Y.) 616.

Persons appointed commissioners in a town's issuance of bonds in exchange for railroad stock, can contract only as expressly authorized by the enabling statute; *e. g.*, they cannot stipulate that

the proceeds of the bonds shall be used to purchase ties that shall be their property until laid in a completed road, and that a part of the road shall be completed by a certain date. And the company, though having tendered the stock, may insist on the invalidity of the contract; and with the void contract would fall any guaranty of performance. *Joslyn v. Dow*, 19 Hun (N. Y.) 494.

Town commissioners who have received tax money to pay coupons, cannot set up invalidity of the town bonds, even under a town resolve to resist and be indemnified. *First Nat. Bank v. Wheeler*, 72 N. Y. 201.

A jurisdictional defect in the issuance of town bonds—*e. g.*, that the petition did not appear to be made by a majority of the taxpayers—was held available in defense of non-payment. *Wilson v. Caneadea*, 15 Hun (N. Y.) 218. As to the burden of proof of a jurisdictional defect in town bonds, see *Angel v. Hume*, 17 Hun (N. Y.) 374.

Want of location of the railroad route within the town, as prescribed by the *New York General Railroad Law* of 1850, was held not to invalidate town bonds issued under the *New York Enabling Act* of 1869. *Smith v. Yates*, 15 Blatchf. (U. S.) 89.

Town bonds and coupons issued without seal of the commissioners, contrary to the requirement of the *New York* statute *therefor*, were held void, although their wording showed a seal to be intended. *Avery v. Springport*, 14 Blatchf. (U. S.) 272.

One buying, at a discount, bonds in aid of a railroad, knowing that the town officers had exceeded their authority in exchanging the bonds for an equal nominal amount of stock, leaving it in the power of the railroad company to sell at a discount, was held not to be a *bona fide* holder and to take subject to other defenses. *Starin v. Genoa*, 23 N. Y. 439. *Compare* *Gould v. Sterling*, 23 N. Y. 456; *Gould v. Venice*, 29 Barb. (N. Y.) 442.

A holder of town bonds is not precluded from suing the town thereon, by the mere fact that the statute makes it the duty of the county board to levy a tax to pay them. *Marsh v. Little Valley*, 64 N. Y. 112.

County supervisors cannot raise money or issue bonds on the credit of a town without a vote of a majority of its electors. *People v. Livingstone County*, 34 N. Y. 516.

A taxpayer may maintain an action

to enjoin a town from unlawfully issuing bonds. *Ayers v. Lawrence*, 59 N. Y. 192.

As to the effect of an amendment of a village charter upon a contract for laying a sidewalk, see *Parr v. Greenbush*, 72 N. Y. 463.

The legislature cannot, either absolutely or conditionally, authorize towns to issue bonds and "donate" the proceeds to a private corporation—*e. g.*, to build a railroad between two villages. *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

Town bonds cannot be issued to aid a corporation created for a private purpose—*e. g.*, to erect a dam and sawmill in a village on the Delaware. *Weismer v. Douglas*, 4 Hun (N. Y.) 201; 64 N. Y. 91; 21 Am. Rep. 586. *Compare* the Brooklyn Bridge case, *People v. Kelly*, 76 N. Y. 489.

In an action on coupons of town bonds issued by the railroad commissioners under the *New York Act* of 1866, ch. 398, the town was held not to be precluded by an affidavit of its assessor from showing that in fact the consent of a majority of the taxpayers had not been obtained. *Cagwin v. Hancock*, 84 N. Y. 533.

The legislature cannot constitutionally dispense with the town's consent required by a previous law. *Hardenbergh v. Van Keuren*, 16 Hun (N. Y.) 17; *People v. Batchellor*, 53 N. Y. 128; 13 Am. Rep. 480.

The statutes providing for the bonding of towns, for railroad purposes, were repealed by *New York Const.*, art. 8, § 11, except so far as relating to contracts actually made when it went into effect. No legal obligation was created until the stock subscription was made. *Buffalo, etc., R. Co. v. Railroad Com'rs*, 5 Hun (N. Y.) 485.

Compliance with the statutory requirement in the issuance of town bonds, cannot be questioned collaterally. *Pierce v. Wright*, 6 Lans. (N. Y.) 306.

After a town had issued bonds and their validity had been questioned, a statute was passed authorizing the issuance of new bonds in lieu thereof, at a lower rate. It was held that these were valid. *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490.

A town claiming the proceeds of a bond, was held estopped to deny its validity. *Lyons v. Chamberlain*, 89 N. Y. 578.

A town may be required to pay lost negotiable bonds on receiving a proper bond of indemnity. *Manhattan Sav.*

Inst. v. East Chester, 44 Hun (N. Y.) 537.

Acts of town officers tending to show ratification, were held admissible on the question of validity of its bond. And the validity is determinable by the law in force at the time of their sale; for their sale constitutes their "issue." Brownell v. Greenwich, 44 Hun (N. Y.) 611.

A town which had been fraudulently induced by B. to issue bonds in aid of a railroad company that had not complied with the law, was obliged to pay them after B. had sold them to *bona fide* purchasers. It was held that the town had a right of action against him. Farnham v. Benedict, 107 N. Y. 159, *reversing* 39 Hun (N. Y.) 22.

One purchasing a town bond from a *bona fide* holder for value before maturity, may recover, although knowing that the town disputed its liability thereon. Butterfield v. Ontario, 32 Fed. Rep. 891. Compare Bodley v. Emporia Nat. Bank, 38 Kan. 59.

A town, for its own benefit destroying its bonds and issuing new ones, was held to waive a defense which might have been set up against the old bonds. Chandler v. Attica, 18 Fed. Rep. 299.

As to the requisites of procedure in issuing town bonds, see Mentz v. Cook, 108 N. Y. 501; Alvord v. Syracuse Sav. Bank, 98 N. Y. 599; Ontario v. Hill, 99 N. Y. 324; Solon v. Williamsburgh Sav. Bank, 35 Hun (N. Y.) 1; Mitchell v. Strough, 35 Hun (N. Y.) 83; Thompson v. Mamakating, 37 Hun (N. Y.) 400; Cowdrey v. Canadea, 16 Fed. Rep. 532; Thomas v. Lansing, 14 Fed. Rep. 618; Mellen v. Lansing, 19 Blatchf. (U. S.) 512; 20 Blatchf. (U. S.) 278; Currie v. Lewiston, 15 Fed. Rep. 377; Third Nat. Bank v. Seneca Falls, 15 Fed. Rep. 783; First Nat. Bank v. Walcott, 19 Blatchf. (U. S.) 370; Carrier v. Shawangunk, 20 Blatchf. (U. S.) 307; McCall v. Hancock, 20 Blatchf. (U. S.) 344; Calhoun v. Delhi, etc., R. Co., 28 Hun (N. Y.) 379; Rich v. Mentz, 19 Fed. Rep. 725; Barker v. Oswegatchie, 10 N. Y. Supp. 834; 57 Hun (N. Y.) 594; Berlin Iron Bridge Co. v. Wagner, 57 Hun (N. Y.) 346; People v. Hulbert, 59 Barb. (N. Y.) 446; Knapp v. Newtown, 1 Hun (N. Y.) 268; Marsh v. Little Valley, 4 Thomp. & C. (N. Y.) 116; People v. Morgan, 55 N. Y. 587; Venice v. Breed, 1 Thomp. & C. (N. Y.) 131; Clark v. Oliver, 1 Thomp. & C. (N. Y.) 570; People v. Suffern, 68 N. Y. 321; Phelps

v. Yates, 16 Blatchf. (U. S.) 192; Phelps v. Lewiston, 15 Blatchf. (U. S.) 131; Smith v. Ontario, 15 Blatchf. (U. S.) 267; Stewart v. Lansing, 15 Blatchf. (U. S.) 281; Gray v. York, 15 Blatchf. (U. S.) 335; Foote v. Hancock, 15 Blatchf. (U. S.) 343; Springport v. Teutonia Sav. Bank, 75 N. Y. 397; 84 N. Y. 403; Wellsborough v. New York, etc., R. Co., 76 N. Y. 182; Syracuse Sav. Bank v. Seneca Falls, 21 Hun (N. Y.) 304; 86 N. Y. 317; Federgreen v. Fallsburgh, 25 Hun (N. Y.) 152; Potter v. Greenwich, 26 Hun (N. Y.) 326; Horton v. Thompson, 71 N. Y. 513.

As to requisites of procedure in issuing town bonds in aid of a railroad, under the *New York* acts thereon of 1857 and 1859, amending that of 1856, ch. 64, see Duaneburgh v. Jenkins, 57 N. Y. 177. No subsequent statute can legalize bonds in aid of a railroad issued by a commissioner under color of right, but not legally authorized, assuming to act for a town on the proposed route thereof. Duaneburgh v. Jenkins, 46 Barb. (N. Y.) 294. Compare People v. Clark, 53 Barb. (N. Y.) 171.

In *North Carolina*, as to the requisites of a valid issuance of town bonds, see Lynehburg, etc., R. Co. v. Person County, 109 N. Car. 159.

The requirement of *North Carolina* Act of 1861, ch. 176, that town bonds be signed by the town magistrate, treasurer and commissioners, was held to be merely directory; and the bonds were held valid, though signed only by the magistrate and treasurer. Bank of Statesville v. Statesville, 84 N. Car. 169.

An innocent holder of school bonds, issued under an unconstitutional act, was held chargeable with knowledge of their illegal origin. Duke v. Brown, 96 N. Car. 127; Markham v. Manning, 96 N. Car. 132.

A purchaser of town bonds issued under an illegal vote, was held chargeable with knowledge of their invalidity. Duke v. Brown, 96 N. Car. 127; Markham v. Manning, 96 N. Car. 132.

The *Ohio* Law of 1889 (86 Ohio Laws 7), providing for the issuance of municipal bonds for natural-gas works, and for a sinking fund for their redemption, was held not to be a special act; and the purpose is a use for which the taxing power can be constitutionally exercised. State v. Toledo, 48 Ohio St. 112.

Upon the validity of town bonds, and the estoppel of taxpayers as against

holders, see *State v. Van Horne*, 7 Ohio St. 327; *Goshen Tp. v. Shoemaker*, 12 Ohio St. 624; 80 Am. Dec. 386.

A town was held liable for borrowed money, though the loan was not expressly authorized by its charter. *Bank of Chillicothe v. Chillicothe*, 7 Ohio 31; 30 Am. Dec. 185.

Where, in order to secure a township vote in aid of a railroad, certain parties, with the railway company's knowledge, executed a mortgage to secure indemnity, it was held that, in the absence of any privity of contract with the bondholders, the mortgagor was not estopped to deny the validity of the bonds. *Hopple v. Hipple*, 33 Ohio St. 116.

Under *Ohio Rev. Stat.*, § 1494, making that township liable for relief to a pauper "only in such amount as the trustees determine to be just and reasonable," a physician cannot recover therefor after their *bona fide* rejection of his claim. *Elizabeth Tp. v. White*, 48 Ohio St. 577.

In *Oklahoma*, a *de jure* successor of a *de facto* municipality comprising the same territory and people, is liable for the valid contracts thereof. *Blackburn v. Oklahoma*, 1 Okl. 292.

The territorial legislature may properly provide for a village's payment of the debts of the preceding provisional government. *Guthrie v. Territory*, 1 Okl. 188.

In *Pennsylvania*, a township is liable to suit on a warrant of its road commissioners, legally drawn upon its treasurer, after his refusal to pay. *East Union Tp. v. Comrey*, 100 Pa. St. 362. A township order does not bear interest. *East Union Tp. v. Ryan*, 86 Pa. St. 459; *Snyder v. Bovaiard*, 122 Pa. St. 442.

A statute authorizing township officers to issue bonds and levy a tax to pay the same, must be strictly pursued. *Meek v. Bayard*, 53 Pa. St. 217.

A contract to furnish natural gas to a borough, with proviso for a decrease of burden *pro rata*, according to the number of franchises granted to other parties, was held valid. *School Dist. v. Ohio Valley Gas Co.*, 154 Pa. St. 539.

The lien of a municipal claim was held to be discharged by sheriff's sale made after the work was done, and before the claim was filed. *Philadelphia v. Cox*, 1 Pa. Dist. Rep. 280.

A borough's issuance of bonds to fund a debt, only a portion of which is beyond the constitutional limit, is an indivisible transaction, and the whole is

invalid. *Millerstown v. Frederick*, 114 Pa. St. 435.

In *South Carolina*, the bonded debt of a municipality cannot exceed eight per cent. of the assessed value of its taxable property. *South Carolina Acts* (1884), p. 690.

As to what is a valid issuance of municipal bonds upon a vote by property, see *Wilson v. Florence* (S. Car. 1893), 17 S. E. Rep. 835; 18 S. E. Rep. 792. As to limit on the bonded debt, see *State v. Cornwell* (S. Car. 1893), 18 S. E. Rep. 184.

If the charter of a municipality be void, its bonds are void, even in the hands of a *bona fide* holder for value. *Ruohs v. Athens*, 91 Tenn. 20.

The bare power given to municipalities by the *Tennessee Act* of 1842, to subscribe to the capital stock of railway companies, was held not to import authority to pay the subscription in bonds. *Green v. Dyersburg*, 2 Flipp. (U. S.) 477.

Authorization of a *Tennessee* town to subscribe for railroad stock, was held not to enforce power to issue bonds in payment. And such bonds cannot be validated by the mayor's consent that a decree be entered declaring them valid. *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127 U. S. 160.

In *Texas*, where a municipal charter required that bonds specify the purpose of issuance, mere mention of the date of the ordinance by virtue whereof they were issued, without stating its title or contents, was held not to protect an innocent holder for value. *Barnett v. Denison*, 145 U. S. 135. In a municipal charter, power to borrow money does not import power to issue bonds. *Brenham v. German American Bank*, 144 U. S. 173. Further, as to municipal bonds, sinking fund, etc., see *Austin v. Nalle*, 85 Tex. 520. A municipality is liable to garnishment. *Laredo v. Nalle*, 65 Tex. 361.

In *Vermont*, as to the requisites and procedure in town subscriptions in aid of railroads, see *Vermont Rev. L.* (1880), § 2760 *et seq.* On refusal of the town treasurer to pay an order of the selectmen or overseer of the poor, the holder may recover of the town, with interest from date of demand. *Vermont Rev. L.* (1880), § 2712. The assignee of an order may sue in his own name. *Davenport v. Johnson*, 49 Vt. 403.

One's omission to present to the town auditor certain items for his expenditures as town officer, was held not to preclude him from recovering in

assumpsit against the town therefor. *Judevine v. Hardwick*, 49 Vt. 180.

A town furnishing necessities to a minor resident sick with small-pox, was held entitled to recover therefor from the town of his settlement. *Brattleboro v. Stratton*, 24 Vt. 306.

A town that had availed itself of the benefit of an enlistment contract, was held to be estopped to repudiate it, on the ground that only one of the selectmen was cognizant of its terms. *Earle v. Wallingford*, 44 Vt. 367.

A town can charge itself for a bounty to volunteers by a vote offering it, and a volunteer's enlistment, without a formal assent by the selectmen. *Jackman v. New Haven*, 42 Vt. 591.

A soldier complying with all the conditions of a town's vote offering a bounty, may recover it, although he did not enlist in reliance thereon, nor under influence thereof. *Davis v. Landgrove*, 43 Vt. 442; *Hill v. Eden*, 41 Vt. 195. But compare *Atwood v. Lincoln*, 44 Vt. 332; 46 Vt. 213; *Sanders v. Bolton*, 47 Vt. 276; *Josselyn v. Ludlow*, 44 Vt. 534. Further, as to the liability of a town upon its vote to pay a bounty for military enlistment, see *Davis v. St. Albans*, 42 Vt. 590; *Gale v. Jamaica*, 39 Vt. 610; *Steinberg v. Eden*, 41 Vt. 187; *Hunkins v. Johnson*, 45 Vt. 131; *Bucklin v. Sudbury*, 43 Vt. 700.

As to the requisites of procedure in issuing *Vermont* town bonds, and the rights of holders as dependent thereon, see *First Nat. Bank v. Dorset*, 16 Blatchf. (U. S.) 62.

In *Virginia*, as to restrictions upon municipal subscriptions to internal improvements, see *Virginia Code* (1887), § 1243.

Power to borrow money imports power to issue bonds therefor. *Bunch v. Fluvanna County*, 86 Va. 452.

As to a condition precedent in municipal bonds that the railway company subscribe to blast-furnace stock, see *Echols v. Bristol* (Va. 1893), 17 S. E. Rep. 943.

In *West Virginia*, as to the power of towns, villages, and cities to issue bonds, the restrictions, etc., see *West Virginia Code* (1891), p. 1018 *et seq.*

In *Wisconsin*, as to the purposes for which towns may issue bonds, see *Wisconsin Annot. Stat.* (1889), § 942. As to the requisites of valid town bonds, see *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543; *De Forth v. Wisconsin, etc., R. Co.*, 52 Wis. 320; 38 Am. Rep.

737; *Lynch v. Eastern, etc., R. Co.*, 57 Wis. 430. When, by law, there is no separate road fund, town orders purporting to be drawn thereon, are payable out of the general fund. *Martin v. Jacobs*, 77 Wis. 31. The town, and not the board of supervisors, is liable on a drainage contract. *Hohl v. Westford*, 33 Wis. 323.

A town is not liable on an order drawn against its treasurer, until demand and refusal. *Packard v. Bovina*, 24 Wis. 382.

A town sued by an innocent holder, was held estopped to deny the date of its bonds, or to allege that they were signed after the clerk had resigned, and not in compliance with the *Wisconsin* Act of 1826, ch. 126, enabling the town to issue them. *Weyauwega v. Ayling*, 99 U. S. 112.

Under authority to issue bonds in aid of a railroad, a town may issue negotiable debentures, if this be an ordinary and convenient form of security. *Bushnell v. Beloit*, 10 Wis. 195.

Town bonds were held invalid for being issued before the authorizing act had taken effect. *Rochester v. Alfred Bank*, 13 Wis. 432; *Berliner v. Waterloo*, 14 Wis. 378.

The absence of any record in the town clerk's office of an affidavit of notice, as required by the Enabling act, was held to put bond-holders on inquiry and to preclude recovery, although the bonds recited compliance, etc. *Veeder v. Lima*, 19 Wis. 280.

A taxpayer may maintain an action to enjoin the issuance of bonds to pay a stock subscription not binding on the town. *Noesen v. Port Washington*, 37 Wis. 168.

The sworn certificate of the chairman of the board of town supervisors upon town bonds, that the condition of their issuance relating to the completion of the *Wisconsin* Central Railroad had been fulfilled, was held to estop the town from denying their validity. *Menasha v. Hazard*, 102 U. S. 81. The fact that the railroad, in aid of which town bonds had been issued, was built by the company's assignee, and that the stock tendered was worthless, was, by a majority of the court, held to afford no ground for enjoining delivery of the bonds. *Lynch v. Eastern, etc., R. Co.*, 57 Wis. 430. A physician employed by town supervisors to attend a poor family, cannot recover for service rendered after the expiration of their term, without direct proof that the contract so

3. *Torts*.—*a. IN GENERAL.*—The liability of towns as distinguished from municipal corporations is generally only such as is defined and prescribed by statute. No liability can arise from the performance of acts wholly outside of the general powers conferred upon them, even though the act be sanctioned by a majority vote, or be subsequently ratified.¹ Towns and townships may be liable for injuries to persons or property for failure to perform their duties and obligations with respect to streets and highways. In the notes will be found many decisions as to this liability.²

extended. *Jones v. Lind*, 79 Wis. 64. As to bonds reciting to be issued on the faith and security of improvement assessments, and the equity to enjoin issuance in excess of the *Wisconsin* constitutional limit of five per cent. on the taxable property, see *Fowler v. Superior* (Wis. 1893), 54 N. W. Rep. 800. As to the requisites of procedure in issuing town bonds, see *Sauerhering v. Iron Ridge*, etc., R. Co., 25 Wis. 447.

In *Wyoming*, as to the issuance of town bonds, see *Wyoming* Sess. L. (1890), p. 110; bonds for water-works, p. 138; coupon bonds, Sess. L. (1891), p. 368. No debt can be created except on vote; also not exceeding two per cent. of the assessed valuation of the taxable property, except as provided in this act (ch. 89), or for supplying the town with water, p. 369, § 7.

1. *Morrison v. Lawrence*, 98 Mass. 219; *Parsons v. Goshen*, 11 Pick. (Mass.) 396.

In *Anthony v. Adams*, 1 Met. (Mass.) 284, Shaw, C. J., said: "Where individuals, although professing to act under color of authority from municipal corporations, do acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate powers of the towns, and not done in the execution of any corporate duty imposed upon the town by law, the town is not liable for the damages occasioned by such acts. Wherein otherwise towns might be rendered responsible upon implied liabilities, in cases where they cannot bind themselves as a corporation by an expressed vote of inhabitants; for it is now well settled that a town in its corporate capacity will not be bound even by the expressed vote of the majority to the performance of contract or other legal duties not coming within the scope of the objects and purposes for which they are incorporated.

A town cannot be held liable for

damages resulting from work which it has no authority to carry on. *Lemmon v. Newton*, 134 Mass. 476; so it cannot be held liable for acts which result in creating a nuisance, when the acts complained of are not within the scope of its corporate powers. See *v. Deering*, 79 Me. 343; *Cushing v. Bedford*, 125 Mass. 526.

2. See also *HIGHWAY*, vol. 9, p. 398; *STREETS*, vol. 24, p. 87.

In *Arkansas*, a town is not liable to a person for an injury resulting from its failure to repair a street. *Arkadelphia v. Windham*, 49 Ark. 139; *Fort Smith v. York*, 52 Ark. 84.

In *Colorado*, proof that a street in the business part of a town is a public thoroughfare generally traveled, and that the proper authorities have voluntarily assumed to keep it in repair, is presumptive evidence of a dedication; and the town may be liable for injuries from a defect therein. *Salida v. McKinna*, 16 Colo. 523.

The fact that a traveler injudiciously chose a side track, when the main track of the highway was passable and safe, was held to exonerate the town from liability for injuries caused by his heavy load breaking through ice. *Burr v. Plymouth*, 48 Conn. 460.

In an action against a town for death from an alleged defect in a highway—*e. g.*, insufficient guard at the bank of a mill pond—the burden is upon the plaintiff to prove that the decedent exercised reasonable care and prudence. *Lutton v. Vernon*, 62 Conn. 1; *Ryan v. Bristol* (Conn. 1893), 27 Atl. Rep. 309. A town was held not liable for a death from the falling of weights attached to a flag stretched over a highway. The statutory requirement of "good and sufficient repair," might still have been fulfilled. *Hewison v. New Haven*, 34 Conn. 136, citing *Hixon v. Lowell*, 13 Gray (Mass.) 59. As to what circumstances the jury are to consider in determining a town's liability

for injuries from an alleged highway defect, see a case involving the effect of the ancient custom of local residents joining in breaking paths through snow-drifts, excusing the selectmen's inaction. *Sceley v. Litchfield*, 49 Conn. 134; 44 Am. Rep. 213. As to what circumstances are to be considered by the jury in determining whether a highway was "reasonably safe," see *Lee v. Barkhamstead*, 46 Conn. 213. Further, as to the liability of towns to persons injured by defects of highways, the requisite notice, etc., see *Connecticut Gen. Stat.* (1888), § 2673 *et seq.*; *Lilly v. Woodstock*, 59 Conn. 219; *Manning v. Woodstock*, 59 Conn. 224; *Biesiegel v. Seymour*, 58 Conn. 43; *Sceley v. Bridgeport*, 53 Conn. 1; *Brown v. Southbury*, 53 Conn. 212; *Burlington v. Schwarzman*, 52 Conn. 181; 52 Am. Rep. 571; *Cloughessey v. Waterbury*, 51 Conn. 405; 50 Am. Rep. 38; *Tuttle v. Winchester*, 50 Conn. 496. As to the rights and liability of towns or boroughs in turning water from highways, see *Connecticut Gen. Stat.* (1888), §§ 2683, 2747; *Bronson v. Wallingford*, 54 Conn. 513. A town was held liable to one who had contracted therewith to keep a certain highway in repair, for so depositing materials as to choke a drain and injure the road. *McNary v. Chamberlain*, 34 Conn. 384; 91 Am. Dec. 732. An abutter was held entitled to recover the value of a sidewalk destroyed by a grade crossing. *Shelton Co. v. Birmingham*, 62 Conn. 456.

In *Georgia*, a town was held liable to the tenant of a house demolished by the town authorities to prevent the spread of a conflagration, for the destruction of his furniture. *Dawson v. Kuttner*, 48 Ga. 133.

A municipality was held not to be liable to one who, when aware of the defect, walked into a hole in the sidewalk. *Sheats v. Rome* (Ga. 1893), 17 S. E. Rep. 922. But compare *Ball v. El Paso* (Texas Civ. App. 1893), 23 S. W. Rep. 835. Further, as to municipal liability for defective streets, see *Bryan v. Macon* (Ga. 1893), 18 S. E. Rep. 351.

In *Illinois*, an incorporated town was held liable for injuries from a defective bridge, although the township authorities had assumed to keep it in repair. *Mechanisburg v. Meridith*, 54 Ill. 84.

Municipal obligation to keep the streets in repair is not suspended during the change from town to village

organization, under the *Illinois* statute of 1872. *Evanston v. Gunn*, 99 U. S. 660.

A village is not bound to insure against the condition of a sidewalk, caused by an extraordinary snow-fall packing and freezing. *Gibson v. Johnson*, 4 Ill. App. 288.

One injured because of the unsafe condition of a drain-covering used by the public as a street crossing, was held entitled to recover of the municipality. *Champaign v. Petterson*, 50 Ill. 61. Compare the hay-scale platform case, *Whitney v. Essex*, 42 Vt. 520.

A town is liable equally with a natural person in trespass *de bonis asportatis*, for taking the goods of another than the execution defendant. *Wolf v. Boettcher*, 64 Ill. 316.

The *Illinois* rule as to contributory negligence, was applied in an action against a town for injury from a defective sidewalk. *Senger v. Harvard* (Ill. 1893), 35 N. E. Rep. 137.

In *Indiana*, a town is not liable for an illegal arrest made without warrant and under an invalid ordinance. *Laurel v. Blue*, 1 Ind. App. 128, *citing* *Dill. on Mun. Corp.* (4th ed.) 975; *Anderson v. East*, 117 Ind. 126.

A township is not liable to an abutter for injury from the road supervisor's work in repairing. *Union Civil Tp. v. Berryman*, 3 Ind. App. 344. But compare *Jeffersonville v. Myers*, 2 Ind. App. 532.

A town is not responsible to a property owner for failure to exercise its power to provide drainage. *Monticello v. Fox*, 3 Ind. App. 431.

As to a municipality's liability to an owner of low land, for allowing a drain to become clogged up, see *Valparaiso v. Cartwright* (Ind. App. 1893), 35 N. E. Rep. 1051.

The fact that the town trustee first knew of the defect in the sidewalk only two hours before the accident, was held not to be conclusive of due care on the part of the town. *Jewell v. Sullivan*, 5 Ind. App. 188.

Upon a general verdict, the appellate court may presume that the municipality had notice of a sidewalk defect. *Fort Wayne v. Patterson*, 3 Ind. App. 34. But compare *Rosedale v. Ferguson*, 3 Ind. App. 596; *Nappanee v. Buckman* (Ind. App. 1893), 34 N. E. Rep. 609.

A municipality was held liable for a personal injury from an iron gutter-crossing in a much traveled street becoming worn smooth; the defect having

remained ten months. *Lyon v. Logansport* (Ind. 1893), 35 N. E. Rep. 128.

As to the liability of a municipality for a personal injury from an electric wire negligently fastened, see *LaFayette v. Ashby* (Ind. App. 1893), 34 N. E. Rep. 238.

One cannot recover of the township for the sheep killed by dogs, without strict compliance with the statute as to ten days' written notice, etc. *Abell v. Prairie Civ. Tp.*, 4 Ind. App. 599.

The rule that a pedestrian has a right to presume that an unlighted sidewalk is in a safe condition, applied where the injury was from an excavation made by a third party with the plaintiff's knowledge, and without the consent of the town. *Elkhart v. Ritter*, 66 Ind. 136.

A township is not liable for an injury caused by a neglect to keep a highway in repair. *Ycager v. Tippecanoe Tp.*, 81 Ind. 46.

A town is liable to an abutter for damages from negligently obstructing a drain in street grading. *Princeton v. Gieske*, 93 Ind. 102.

The probability of slight consequential damage to an abutter's land from the town's change of a water-course, was held to be no ground for an injunction. *Sullivan v. Phillips*, 110 Ind. 320.

A town empowered to require an abutter to improve the sidewalk is, upon proof of notice and negligence, only liable for an injury from his excavating. *Dooley v. Sullivan*, 112 Ind. 451.

In *Iowa*, a municipality was held not to be liable for the false imprisonment of a spectacles peddler, under an unconstitutional ordinance requiring a license fee. *Trescott v. Waterloo*, 26 Fed. Rep. 592.

The fact that a street has not been accepted by special ordinance, will not preclude recovery by one injured from a defect therein. *Byerly v. Anamosa*, 79 Iowa 204, *distinguishing* *Laughlin v. Washington*, 63 Iowa 652.

Expert testimony is admissible as to the durability of the material of an alleged rotten sidewalk. *McConnell v. Osage*, 80 Iowa 293.

To establish a presumption that the municipality had notice of the defect, evidence is admissible that for the entire length of the block the sidewalk was defective. *McConnell v. Osage*, 80 Iowa 293, *following* *Armstrong v. Ackley*, 71 Iowa 76, and *distinguishing* *Ruggles v. Nevada*, 63 Iowa 185.

Although an ordinance may not be

the standard of care, its provisions may be properly considered in determining whether a sidewalk was properly constructed. So held, as to one requiring certain board walks to have three stringers; that on which the accident occurred having only two. Proof that the municipal officers had sent a man to repair the defective planking, was held to establish notice of the defect. *Smith v. Pella* (Iowa, 1892), 53 N. W. Rep. 226.

A decayed bill-board standing against a sidewalk and tending to unsafety, was held to render the walk "defective," within the statute requiring notice to the municipality within ninety days after a personal injury therefrom. *Blivens v. Sioux City* (Iowa, 1892), 52 N. W. Rep. 246.

For facts considered insufficient to warrant a presumption of the municipality's knowledge of the defect in a sidewalk, see *Theissen v. Belle Plaine*, 81 Iowa 118.

Where a quarry owner obstructed a street by rocks from a bluff, it was held that the municipality was liable for appropriating a portion to repair the street, and could not counter-claim for cost of a removal of the remainder. *Kemper v. Burlington*, 81 Iowa 354.

In a suit against a town for injury from a loose plank, evidence that a sidewalk was generally out of repair in its vicinity, was held inadmissible. *Ruggles v. Nevada*, 63 Iowa 185. But *compare* *Armstrong v. Ackley*, 71 Iowa 76.

Unless required by statute, no claim need be made against the town before suit for injuries from a defective sidewalk. *Green v. Spencer*, 67 Iowa 410.

The fact that before the accident, a member of the town council had ordered an abutter to repair certain sidewalk defects, was held not to charge the town with notice of the defect—loosened planking—that caused the accident, although at the same place. *Carter v. Monticello*, 68 Iowa 178.

As to what circumstances are to be considered by the jury in determining the liability of a town for injuries from an alleged defective highway, see a case of an excavation mound, *Stafford v. Oskaloosa*, 57 Iowa 748; *Thomas v. Brooklyn*, 58 Iowa 438; *Beazan v. Mason*, 58 Iowa 233; *Sikes v. Manchester*, 59 Iowa 65; *Cressy v. Postville*, 59 Iowa 62; *Parkhill v. Brighton*, 61 Iowa 103.

In *Kansas*, neglect of road overseers

to erect depth indicators at fords, as required by *Kansas* Gen. Stat. (1889), § 5514, does not render the town liable as for a defective highway, under *Kansas* Laws (1887), ch. 237. *Quincy Tp. v. Sheehan*, 48 Kan. 620.

A municipality was held not to be liable for damages caused by the caving in of a drain, planned by its engineer to be constructed by private parties. *Kansas City v. Brady* (Kan. 1893), 34 Pac. Rep. 884.

As to when a municipality is not bound to provide danger signals or barriers at excavations near streets, see *Mulvane v. South Topeka*, 45 Kan. 45; *Kansas City v. Birmingham*, 45 Kan. 212.

Lapse of time and other circumstances considered to raise a presumption of notice to the municipality of a defect in a sidewalk, are considered in *Kansas City v. Bradbury*, 45 Kan. 381; *Abilene v. Cowperwait* (Kan. 1893), 34 Pac. Rep. 795.

Kansas had, in 1879, no express statute imposing on townships a liability for injuries from a defective highway. *Eikenberry v. Bazaar Tp.*, 22 Kan. 556; 31 Am. Rep. 198.

In *Kentucky*, the rule of liability for torts as to towns and like municipal corporations, is like that established in *Alabama*, *Arkansas*, *Illinois*, etc. In *James v. Harrodsburg*, 85 Ky. 191, the court, by Pryor, C. J., in deciding that the town was not liable for injury to a pedestrian from a citizen's blasting on his private property, said: "The power to abate a nuisance may be expressly given; but the failure to provide the means of removing the nuisance, or the omission of its officers to remove it when the means are provided, gives no cause of action to those who are injured by this neglect of duty. The party creating the nuisance is liable in a civil action, and may be indicted for the offense," citing *Davis v. Montgomery*, 51 Ala. 139; 23 Am. Rep. 545, and *distinguishing* *Parker v. Macon*, 39 Ga. 729.

In *Maine*, no town is liable for damages from a defective public way where no statute gives any action; none is given to the father of a child whose life is lost by the defect. *Frazer v. Lewiston*, 76 Me. 531. In an action against a town for death from a highway defect, the plaintiff has the burden of showing that the deceased was in the exercise of due care. *Merrill v. North Yarmouth*, 78 Me. 200; 57 Am. Dec. 794.

An action against a town, being in

derogation of the common law, only lies upon proof of strict compliance with the statute as to the twenty-four hours' notice. *Haines v. Lewiston*, 84 Me. 18.

The occurrence of a thaw, was held to be sufficient notice to a town of the unsafe condition of a highway partially obstructed by snow and only broken out over a frozen ditch. *Savage v. Bangor*, 40 Me. 176; 63 Am. Dec. 568.

As to when an individual inhabitant's knowledge of a highway defect imports notice to the town officers, see *Mason v. Ellsworth*, 32 Me. 271; *Tuell v. Paris*, 23 Me. 556; *Springer v. Bowdoinham*, 7 Me. 442; *French v. Brunswick*, 21 Me. 29.

Where the driver of a sled heavily loaded with hay, knew that there was an insufficiency of snow-breaks or "turn-outs," and was injured in trying to pass a large load of logs met, it was held that he could not recover of the town, without proof of having previously given to the municipal officers the notice required by *Maine* Stat. (1879), ch. 156, § 3. *Haines v. Lewiston*, 84 Me. 18, *distinguishing* *Holmes v. Paris*, 75 Me. 559. To render a town liable for a highway obstruction—e. g., boiler left over night on its way to a navy yard—the town officers must have notice that it was there needlessly and unlawfully. *Bartlett v. Kittery*, 68 Me. 358. The statutory notice of claim for an injury cannot be waived by a municipal officer. *Veazie v. Rockland*, 68 Me. 511. A town was held not to be liable for injury from a defect in a portion of a highway not affecting the safety of the usually traveled portion. *Dickey v. Maine Tel. Co.*, 46 Me. 483. A town is not bound to make a highway passable for its entire width. *Tasker v. Farmingdale*, 85 Me. 523. The law requires no particular width for the traveled portion. *Penley v. Auburn*, 85 Me. 278. A town is not bound to keep a road in good condition at any greater width than is demanded by the public needs. *Farrell v. Oldtown*, 69 Me. 72. The safety required is only that in view of such casualties as may reasonably be expected to happen to travelers. *Morse v. Belfast*, 77 Me. 44, *quoting* *Chapman, C. J.*, in *Macomber v. Taunton*, 100 Mass. 256; "Ditches are so necessary for the proper drainage of the carriage-way that they are held not to be defects, improperly constructed, though travelers may be liable to fall into them in the dark;" also *quoting* *Peters, J.*, in

Spaulding v. Winslow, 74 Me. 528: "There are many thousands of such places within this state. If railings were required for them, towns would have extraordinary burdens to maintain their roads." The statutes do not undertake to define precisely what imperfection is a "defect," or what negligence on the part of the town authorities is a want of due care; this is for jurors to determine. *Morse v. Belfast*, 77 Me. 44.

The fact that the unsafety resulted from a railway company's alteration of the highway, was held not to exonerate the town from liability for a consequent personal injury. *Phillips v. Veazie*, 40 Me. 96; *Veazie v. Penobscot R. Co.*, 49 Me. 119.

A traveler perceiving a highway to be undergoing repairs, and only a narrow passage-way to be opened, is bound to exercise the caution of a man of ordinary prudence. Otherwise, he cannot recover of the town for consequent injury, even though there was no posted notice of danger. *Jacobs v. Bangor*, 16 Me. 187; 33 Am. Dec. 652.

A statutory requirement of safety and convenience imports the placing of light where repairs of a highway are left incomplete at night. *Kimball v. Bath*, 38 Me. 219; 61 Am. Dec. 243.

As to what circumstances the jury are to consider in determining whether a highway is kept by the town "safe and convenient" within the statute, see *Church v. Cherryfield*, 33 Me. 460; *Morton v. Frankfort*, 55 Me. 46; *Frost v. Portland*, 11 Me. 271; *Johnson v. Whitefield*, 18 Me. 286; 36 Am. Dec. 721; *Merrill v. Hamden*, 26 Me. 234; *Lowell v. Moscow*, 12 Me. 300; *Farrar v. Greene*, 32 Me. 574; *Brown v. Watson*, 47 Me. 161; 74 Am. Dec. 482; *Crumpton v. Solon*, 11 Me. 335; *Dennett v. Wellington*, 15 Me. 27; *Libbey v. Greenbush*, 20 Me. 47; *Foster v. Dixfield*, 18 Me. 380; *Verrill v. Minot*, 31 Me. 299; *Moore v. Abbott*, 32 Me. 46; *Willey v. Ellsworth*, 64 Me. 57.

A town is liable for the condition of a toll-bridge connecting two highways. *Bradbury v. Benton*, 69 Me. 194.

Where two towns had united in maintaining a bridge over the boundary stream, it was held that the liability of one of them for a defect on its own side of the line, was not affected by the fact that the other town was also negligent. *Perkins v. Oxford*, 66 Me. 545.

In an action for an injury from a defect in an alleged town way, the town is

not estopped to deny the allegation by the mere fact that its officers gave materials for its improvement to one using it as a private way. *Gilpatrick v. Biddeford*, 51 Me. 182.

A town was held not to be liable for injury to land from a wrongdoer choking a highway culvert; the town officers not being in fault of act or neglect. *Peck v. Ellsworth*, 36 Me. 393.

A town is not liable for damages to an abutter from an overflow caused by a defect in a highway drain, unless required by statute or at common law to construct a drain. *Estes v. China*, 56 Me. 407.

A municipality was held not to be liable for damages to an abutter, from the insufficiency of a culvert built by a railway company in its location on a street. *Lander v. Bath*, 85 Me. 141.

There being no statute authorizing a town to construct sewers, it is not liable for a nuisance created in the digging, etc., before their completion. *Bulger v. Eden*, 82 Me. 352.

A town was held to be liable for an injury caused by a ram kept upon its poor-farm for propagation, but negligently suffered to run at large. *Moulton v. Scarborough*, 71 Me. 267; 36 Am. Rep. 308.

In *Massachusetts*, under the statute of 1869, authorizing county commissioners to change the channel of a stream running to tide-water, as they deem necessary for drainage, a town or city is not liable to a riparian owner above for damages from the consequent backflowage. *Cochrane v. Malden*, 152 Mass. 365. As to the remedy of a riparian owner for pollution of the stream by street drainage, see *Bainard v. Newton*, 154 Mass. 255.

A town was held liable for damages from its neglect to keep a common drain unchoked. *Bates v. Westboro'*, 151 Mass. 174. But as to gutter water flooding adjoining land, see *Collins v. Waltham*, 151 Mass. 196, and *compare Woodbury v. Beverly*, 153 Mass. 245.

An abutter under a permit entering his drain into a public sewer, was held not entitled to recover for damage to his cellar for the inadequate size of the sewer. *Buckley v. New Bedford*, 155 Mass. 64. *Compare Livingstone v. Taunton*, 155 Mass. 363.

A town having accepted the statute authorization to lay water-pipes, etc., was held liable for injuries to a traveler from the defective construction, although no statutory action lay for a

highway defect. *Hand v. Brookline*, 126 Mass. 324.

A town was held to be liable for injuries from the negligent management of its poor-farm, namely, an employé's wagon colliding with a blind man; the managers being at the same time overseers of the poor, highway surveyors, and selectmen. *Neff v. Wellesley*, 148 Mass. 487.

A town was held not to be liable for injury to a traveler from an obstruction in a highway—a railroad trestle—where the selectmen had done their statutory duty of applying to the county commissioners for its removal. *Flanders v. Norwood*, 141 Mass. 17.

A town is not liable for an injury from a defect in a bridge or its approaches which a railway company is bound by law to keep in repair; and this, though the town has contracted therewith to keep it in repair, has made repairs to it within six years, has known of the defect, and failed to warn the public thereof. *Rouse v. Somerville*, 130 Mass. 361. Nor would the railway corporation be liable therefor, without the notice required by *Massachusetts Stat. (1877)*, ch. 234. *Dickie v. Boston*, etc., R. Co., 131 Mass. 516.

A town giving the free use of a public building for an entertainment was held not to be liable to a person attending it and injured by falling into a trench near the building and outside the highway. *Larrabee v. Peabody*, 128 Mass. 561. *Compare*, as to municipal non-liability for injuries from defective walks on Boston Common, a pleasure-ground furnished by the city not for gain, *Steele v. Boston*, 128 Mass. 583. Nor is liability for such injury thereon, imported by the fact that part of the town common is occupied by a building used for pecuniary benefit to the town. *Clark v. Waltham*, 128 Mass. 567. But *compare* *Burnham v. Boston*, 10 Allen (Mass.) 290.

A town which has assumed the duties of school districts is liable for an injury to a scholar from a dangerous excavation in the schoolhouse yard, owing to the negligence of the town officers. *Bigelow v. Randolph*, 14 Gray (Mass.) 541.

A town is liable for a defect in a dedicated private way near its entrance into the highway, unless the public be properly cautioned. *Paine v. Brockton*, 138 Mass. 564.

Where a dangerous and accessible place was nine feet from the highway

location, and over thirty feet from the traveled part, it was held, that the town was not liable for failure to erect a barrier. *Barnes v. Chicopee*, 138 Mass. 67; 52 Am. Rep. 259. *Compare* *Kelley v. Columbus*, 41 Ohio St. 263.

Where the accident occurred twenty-five feet from the road, the absence of a railing was held not to be a defect for which the town was liable. *Hudson v. Marlborough*, 153 Mass. 218.

Proof that a generally traveled sidewalk had been formally laid out, is not necessary in order to establish liability of the municipality for injury from a defect therein. *Weare v. Fitchburg*, 110 Mass. 334.

In an action for injury from a defect in a road used as a town way, the town may show that the road had not been laid out and accepted as a highway. *Jones v. Andover*, 9 Pick. (Mass.) 146; *criticised* in *Higginson v. Nahant*, 11 Allen (Mass.) 534.

General uninterrupted public use of a road as a highway for twenty years, was held to import dedication and acceptance, rendering the town liable for want of repair thereof. *Jennings v. Tisbury*, 5 Gray (Mass.) 73.

As to what is non-user of a highway amounting to such discontinuance as to preclude recovery of the town for an injury from its non-repair, see *Tinker v. Russell*, 14 Pick. (Mass.) 279.

A town was held liable for a personal injury upon a highway undergoing repairs; its officers having reason to know that the barriers were often taken down and left. *Howard v. Mendon*, 117 Mass. 590.

A town or other municipality is bound only to keep a street or sidewalk "safe and convenient for travelers;" not to insure them from snow or ice falling from a roof-gutter. *Hixon v. Lowell*, 13 Gray (Mass.) 59.

The fact that the unsafety resulted from a railway company's alteration of the highway, was held not to exonerate the municipality from liability for a consequent personal injury. *Currier v. Lowell*, 16 Pick. (Mass.) 170. But *compare* the criticism by Shaw, C. J., in *Vinal v. Dorchester*, 7 Gray (Mass.) 421, that, "*Currier v. Lowell* carries the liability of towns to its extreme extent in this respect." Therein he held Dorchester not to be liable for injury from a railway track, illegally laid across a highway. *Compare* also the case of an aqueduct easement, where the town was

nevertheless held liable. *Merrill v. Wilbraham*, 11 Gray (Mass.) 156.

Where insufficient width was an alleged defect of a highway, evidence that vehicles had often met there and passed with room to spare, and without accident, was held inadmissible. *Aldrich v. Pelham*, 1 Gray (Mass.) 510.

The fact that a traveler driving a high-spirited horse had previously seen and passed a culvert hole, but now did not think of it, owing to mental preoccupation with business, was held not conclusive of contributory negligence. *Gilman v. Deerfield*, 15 Gray (Mass.) 577.

A stone remaining in a highway twenty-four hours, may be a defect rendering the town liable, although its position has meanwhile been changed by human agency. *Macarty v. Brookline*, 114 Mass. 527. But compare the case of a new cover to a coal-hole, substituted after the notification. *Crosby v. Boston*, 118 Mass. 71.

Further, as to what circumstances the jury are to consider in determining whether a highway is kept by the town "reasonably safe and convenient for travelers," see the case of a stone left in a traveled portion, *Bigelow v. Weston*, 3 Pick. (Mass.) 267; a stone not in the road-bed, *Smith v. Wendell*, 7 Cush. (Mass.) 408; lumber out of the traveled path, *Snow v. Adams*, 1 Cush. (Mass.) 443; want of a railing, *Hayden v. Attleborough*, 7 Gray (Mass.) 338; traveler's venturing outside the path, *Tisdale v. Norton*, 8 Met. (Mass.) 388; time of existence of defect, *Brady v. Lowell*, 3 Cush. (Mass.) 121; *Palmer v. Andover*, 2 Cush. (Mass.) 600; *Murdock v. Warwick*, 4 Gray (Mass.) 178; a post in a line of road undefined by fences, *Coggsell v. Lexington*, 4 Cush. (Mass.) 307; a telegraph post, *Young v. Yarmouth*, 9 Gray (Mass.) 386; a daguerrean saloon outside the traveled path, *Keith v. Easton*, 2 Allen (Mass.) 552; an awning over a sidewalk falling, *Day v. Milford*, 5 Allen (Mass.) 98; the slant as to ice formation, *Stanton v. Springfield*, 12 Allen (Mass.) 566; a horse that had dropped dead, *Cook v. Charlestown*, 13 Allen (Mass.) 190; traveler leaping from a carriage just before reaching a culvert hole, *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563; persistent traveling into snow-drifts, *Horton v. Ipswich*, 12 Cush. (Mass.) 488; traveler's near residence and familiarity with the defect,

Frost v. Waltham, 12 Allen (Mass.) 85; post-hole left by building movers unguarded in a foggy night, *Pollard v. Woburn*, 104 Mass. 84; narrowness and crookedness of way, *Smith v. Wakefield*, 105 Mass. 473; recognition of a foot-path by long use, *Whitford v. Southbridge*, 119 Mass. 564; one venturing outside the traveled way on an unrailed culvert to rescue his servant from the water, *Harwood v. Oakham*, 152 Mass. 421.

As to restrictions upon expert testimony in an action against a town for personal injury from an alleged negligent filling of a trench dug in laying street pipes, see *Stoddard v. Winchester*, 157 Mass. 567. Record of the town vote as to locating a sewer and appropriating money, is admissible in an action for personal injury. *Breen v. Field*, 157 Mass. 277. So, also, evidence of the taxation and the amount of appropriation for highways the year preceding the accident, on the question of the town's diligence. *Weeks v. Needham*, 156 Mass. 289.

In *Logan v. New Bedford*, 157 Mass. 534, it was held that the circumstances rendered the danger of a pedestrian's falling from a bank wall too unusual to require a barrier at the sidewalk.

One cannot recover for injury from a defect in a highway, suffered while not using it for travel; *e. g.*, for a playground. *Tighe v. Lowell*, 119 Mass. 472. So held where a child was injured by sitting down upon an unplaced curbstone. *Lyons v. Brookline*, 119 Mass. 491.

One cannot maintain an action against a town for injury received by him because of a highway defect, when he was traveling on the Lord's day neither from necessity or charity; and the burden is on him to show other purpose. *Bosworth v. Swansea*, 10 Met. (Mass.) 363; 43 Am. Dec. 441.

The Sunday defense need not be specially averred. Illness of a marketman, was held not to render it a work of necessity for his servant to travel to fulfill an agreement to supply a customer with fresh meat. *Jones v. Andover*, 10 Allen (Mass.) 18.

Walking for exercise and air Sunday evening, was held not to preclude the recovery. *Hamilton v. Boston*, 14 Allen (Mass.) 475. Nor going to buy medicine for a sick child. *Gorman v. Lowell*, 117 Mass. 65. But otherwise, the returning from a funeral by a circuitous route merely to make a social call.

Davis v. Somerville, 128 Mass. 594; 35 Am. Rep. 399.

The corporate doings of a *Massachusetts* town are as entirely political as are those of the general legislative court. An action for libel will not lie against a town for publication of defamatory matter in the official report of a duly appointed investigating committee, accepted and printed by the town. Howland v. Maynard, 159 Mass. 434.

Under the *Massachusetts* Act of 1786, ch. 18, actual notice to the town officers was not necessary to render the town liable for injury from an open and visible highway defect that could have been prevented by ordinary diligence. Lobdell v. New Bedford, 1 Mass. 153; Reed v. Northfield, 13 Pick. (Mass.) 94.

A town was held liable without notice, for an injury from a trench left unguarded by one with whom it had contracted to lay a water-pipe and to guard and light the same at night. Brooks v. Somerville, 106 Mass. 271.

In order to hold a town responsible on the ground of implied notice of a defect in the road, there should be such a condition of things as fairly to indicate that there may at any time be danger in using the road. Thus, a town was held not to be liable for an injury from a defect in a highway, whereof it had no notice other than that implied from a fact of a heavy storm and the digging of a trench for a water-pipe; six months intervening. Stoddard v. Winchester, 154 Mass. 149.

Taking one of the selectmen to the place next day, and describing the accident, and sending a letter to them asking compensation, was held to be sufficient notice to the town. Harris v. Newbury, 128 Mass. 321.

In Blank v. Livonia Tp., 79 Mich. 1, in deciding that the township was not liable for injury from the breaking of a bridge-stringer imperceptibly weakened by "dry rot," the court, by Champlin, J., said: "Townships are not insurers of the safety of the bridges and highways within their limits. . . . They are liable for a neglect of this duty only when it is shown that such township has had reasonable time and opportunity, after knowledge or notice to such township that such highway or bridge has become unsafe or unfit for travel, to put the same in proper condition for use, and has not used reasonable diligence therein." But the authorities must take notice, at their peril, of the width of a roadway required by

the necessities of travel, in a given case. Sebert v. Alpena, 78 Mich. 165.

Michigan Sess. L. 1887, No. 264, must be construed to render a township liable for injuries from a defective crosswalk in an incorporated village. Frary v. Allen Tp., 91 Mich. 666. A road turnpike and in use fifteen years, was held to be, within *Michigan* Stat. (1882), § 1315, such a public highway that the town would be liable for injuries to a traveler from colliding, at a point opposite cleared land, with a log partially imbedded therein. Langworthy v. Green Tp., 88 Mich. 207. Where, beside a highway on a river bank, the barrier was a breakwater of slabs, and there were two underminings in the fillings, into only one of which a danger signal had been thrust, it was held that the town was liable for injuries to a rider of a horse falling into the unguarded one while avoiding a mud-hole. Wakeham v. St. Clair Tp., 91 Mich. 15.

Contributory negligence will not be presumed from knowledge of the existence of a defect in a sidewalk; but it enjoins commensurate care. Dittrich v. Detroit (Mich. 1893), 57 N. W. Rep. 125. Compare Hohn v. Carver (Minn. 1893), 56 N. W. Rep. 826.

As to evidence presumptive of long continuance of the defect in a sidewalk, town official's knowledge, etc., see Edwards v. Three Rivers, 96 Mich. 625; Alberts v. Vernon, 96 Mich. 594.

Proof that the defendant municipality ought to have known of the rotten condition of the sidewalk and had had sufficient time, with reasonable diligence, to repair it, was held sufficient. Fuller v. Jackson, 92 Mich. 197.

As to what is a defect in a crosswalk over a street car track, for which a municipality is liable, see Bigelow v. Kalamazoo, 97 Mich. 121.

A resolution of the council that trees in a sidewalk be cut down, was held not to establish notice to municipal officers of a defect from the settling of the walk, leaving a stump projecting. Lappread v. Detroit, 95 Mich. 255.

There can be no recovery against a municipality for injury from an ordinary danger incident to the use of a street car track for driving purposes, *e. g.*, the sinking of a wagon-wheel in the ruts outside the rails in a narrow, unpaved street. Kornetszki v. Detroit, 94 Mich. 341.

A village council's authorization to sign water-works bonds, was held not

to import power in the president to deliver them. *Portsmouth Sav. Bank v. Ashley*, 96 Mich. 670.

A municipality, having erected a market building with columns resting upon piers without anchors, was held liable for a personal injury from its being blown down in a gale. *Barron v. Detroit*, 94 Mich. 601.

A township was held liable for injury from the breaking down of a bridge not kept strong enough to support the original test weight. *Stebbins v. Keene Tp.*, 60 Mich. 214. So, also, as to defects in a bridge, discoverable by the proper watchfulness of its officers. *Stebbins v. Keene Tp.*, 55 Mich. 552.

Further, as to what circumstances the jury are to consider in determining a town's liability for injuries from an alleged highway defect, see *Medina Tp. v. Perkins*, 48 Mich. 67; *Keyes v. Marcellus*, 50 Mich. 439; 45 Am. Rep. 52; *Dotton v. Albion*, 50 Mich. 129. See also the case of a woman running for a physician, and injured by the misplaced planking of a cross-walk earlier in the evening near the residence of the village commissioner. *Dotton v. Albion*, 50 Mich. 130; 57 Mich. 575.

In *Minnesota*, as to the care of highways, a township is a mere governmental agency. *Pine City v. Munch*, 42 Minn. 342; *Hutchinson Tp. v. Filk*, 44 Minn. 536. A town has no statutory liability to an individual for damages from a defective highway; its duty therein is only to the state. *Altnow v. Sibley*, 30 Minn. 186; 44 Am. Rep. 191, citing *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332, and *distinguishing* *Shurtle v. Minneapolis*, 17 Minn. 308.

As to the liability of a municipality to an administrator for the death of a child, occasioned by a highway defect, see *Nichols v. St. Paul*, 44 Minn. 494.

As to municipal liability, where the topography of a ravine shows necessity for special care in grading and sluicing, see *Stoehr v. St. Paul* (Minn. 1893), 56 N. W. Rep. 250.

Evidence of the bad condition of the sidewalk four weeks after the consequent accident, was held admissible. *Johnson v. St. Paul*, 52 Minn. 364.

The traveler's previous knowledge of the defect in the sidewalk does not always preclude recovery of the municipality for personal injury therefrom. *Maloy v. St. Paul* (Minn. 1893), 56 N. W. Rep. 94. But compare *Wright v. St. Cloud* (Minn. 1893), 55 N. W. Rep. 819.

Whether a lapse of nine hours with-

out repairing, after a defective grading had been placed over a coal-hole in a sidewalk on a much-traveled street, proves culpable negligence in the municipality, is for the jury to determine. *Stellwagen v. Winona* (Minn. 1893), 56 N. W. Rep. 51.

One town resident damaged not differently, nor more than others, by a lawful change of a highway route, cannot maintain an action therefor. *Conklin v. Fillmore County*, 13 Minn. 454.

The fact that the injured person knew that a platform erected by a store proprietor in a public street was unsafe from want of an adequate railing, was held not to exonerate the village from liability. *Estelle v. Lake Crystal*, 27 Minn. 243.

A village was held liable for a personal injury from neglect to properly cover a street culvert. *O'Gorman v. Morris*, 26 Minn. 267.

One's previous knowledge of a street defect will not necessarily bar his recovery for a consequent injury. *McKenzie v. Northfield*, 30 Minn. 456.

In *New Hampshire*, where a public sewer is being constructed with due care, neither the municipality nor the contractor is liable for an incidental injury; *c. g.*, to gas-pipes. *Portsmouth Gas Light Co. v. Shanahan*, 65 N. H. 233, citing the rock-blast case, *Nashua Iron, etc., Co. v. Worcester, etc., R. Co.*, 62 N. H. 159.

In an action for injuries from a defective highway, the defendant town is not estopped to deny that the highway was established in the statutory method. *Tilton v. Pittsfield*, 58 N. H. 327; *Wentworth v. Rochester*, 63 N. H. 244. But omission to comply with a directory statutory requirement—*c. g.*, to record the certificate in thirty days—cannot be availed of. *Randall v. Conway*, 63 N. H. 513.

The statement of claim required by *New Hampshire* Gen. Laws, ch. 75, to be filed within ten days after the injury from a defective highway, must be filed by the plaintiff's husband; a filing by the injured wife is insufficient. *Sargent v. Gilford* (N. H. 1891), 27 Atl. Rep. 306.

The sending by mail to the town clerk, the notice of injury from a highway defect, is not a "filing," within the *New Hampshire* Statute of 1885, and this, although he received it, and at once showed it to the chairman of the selectmen. *Sowter v. Grafton*, 65 N. H. 207.

One who, after standing in the street for nearly five minutes on Decoration Day to see a procession form, was injured by the falling of a lumber pile, was held not to be "traveling upon a highway." *Varney v. Manchester*, 58 N. H. 430; 40 Am. Rep. 592.

In the absence of contrary evidence, the plaintiff may be presumed to be a "traveler" at the time of the injury. *Norris v. Haverhill*, 65 N. H. 89.

A town is liable for damages to an abutting landowner from accumulations through neglect to repair a highway drain. *Gilman v. Laconia*, 55 N. H. 130; 20 Am. Rep. 175.

Although a road be defective, no recovery can be had of the town for an injury not proven to be caused thereby. The liability is not affected by *New Hampshire Laws* (1887), ch. 101, requiring the surveyor in June and August to remove loose obstructions. *Judd v. Claremont* (N. H. 1892), 23 Atl. Rep. 427.

In an action for injuries to a traveler on the highway, evidence that the defendant had previously directed that her horse be shod to remedy the fault of stumbling, is admissible. *Sprague v. Bristol*, 63 N. H. 430.

The selectmen's admission of the town's liability for a highway accident, is proper evidence against the town. *Gray v. Rollinsford*, 58 N. H. 253.

As to when the town's knowledge of the defect will be presumed, see *Howe v. Plainfield*, 41 N. H. 135.

The town's liability to keep a highway in repair is to be presumed until actual discontinuance. *Winship v. Enfield*, 42 N. H. 197.

In an action for injury from defect of a highway, the town is estopped to plead that a portion thereof was laid out wider than the petition prayed for. *Proctor v. Andover*, 42 N. H. 348. So, also, as to pleading other irregularities in the selectmen's proceedings. *Haywood v. Charlestown*, 43 N. H. 61.

The fact that a traveler failed to obey the law to keep to the right, was held not to preclude him for recovering of the town for injury from his sleigh's colliding with a snow-covered log on the left side in passing a heavily loaded sled. *Gale v. Lisbon*, 52 N. H. 174.

As to the invalidity of the Sunday defense to a traveler's action against the town, for injury from a highway defect, see *Dutton v. Weare*, 17 N. H. 34; 43 Am. Dec. 590.

In general, the practice of neighbor-

ing towns as to repair of roads, is inadmissible on the question of town officer's due care. *Littleton v. Richardson*, 32 N. H. 59. But compare *Packard v. New Bedford*, 9 Allen (Mass.) 200; *Raymond v. Lowell*, 6 Cush. (Mass.) 524. So, also, is inadmissible in proof the fact that a sidewalk was defective from ice, and that other persons had slipped there. *Hubbard v. Concord*, 35 N. H. 52; 69 Am. Dec. 520.

In A's action against a town for an injury from a highway accident while riding with B, evidence was held inadmissible of the town's having made a payment to B for B's injury then resulting. *Grimes v. Keene*, 52 N. H. 330.

A town that had prepared a good road-bed west of a stone protruding eight inches, was held liable for an injury from a traveler's colliding therewith, in passing east of it in a roadway wherein went almost the entire travel. *Saltmarsh v. Bow*, 56 N. H. 428. So, also, in case of a highway turn-out into a private way. *Stark v. Lancaster*, 57 N. H. 88.

A town was held to be liable for a defect in a highway crossing, though it was caused by a railroad company. *Sides v. Portsmouth*, 59 N. H. 24.

Further, as to what circumstances the jury are to consider in determining a town's liability for injury from an alleged defect, see a case of one traveling in the night without a light, *Daniels v. Lebanon*, 58 N. H. 284; wheelmarks upon a log, *Plumer v. Ossipee*, 59 N. H. 55; the selectmen's unqualified offer to indemnify, *Gray v. Rollinsford*, 58 N. H. 253; town's denial of road's statutory establishment, *Tilton v. Pittsfield*, 58 N. H. 327.

In *New Jersey*, although a municipality is liable for personal injuries from an obstruction or hole in a street or sidewalk, the author thereof is primarily liable to the party injured. *Durant v. Palmer*, 29 N. J. L. 544. In case of personal injury from a defective sidewalk, a township is suable only for such neglect as makes all townships liable under the act of 1859, § 20; the application is limited by Pamph. Acts (1860), p. 554, and 1874, p. 237. *Dupuy v. Union Tp.*, 46 N. J. L. 269. Surface water is a common enemy to each landowner; and a municipality is not liable for damages from its flowage down a new street passing over the crest of a hill, and connected with transverse streets, unless drawing off the water of a natural watercourse. *Union v. Durkes*, 38 N. J. L. 21.

A township is liable for damages from the diversion of surface water from its natural flow in street grading. *West Orange Tp. v. Field*, 37 N. J. Eq. 600.

The statutory recovery for injuries from a defective "road," was held not to apply to a street. *Rahway v. Carter* (N. J. 1893), 26 Atl. Rep. 96.

In *New York*, as to the requisites of notification to the highway commissioners, of the defect, see *Embler v. Wallkill*, 132 N. Y. 222.

In an action against a village for an injury from a defect occasioned by the village itself—*e. g.*, in packing a water main—no proof of notice is necessary. *Riddle v. Westfield*, 65 Hun (N. Y.) 432.

As to the requisites of notice of injury from a highway defect under the *New York* Law of 1890, ch. 568, § 16, see *Olmstead v. Pound Ridge*, 71 Hun (N. Y.) 25. As to notice of claim under *New York* Laws (1889), ch. 440, see *Freligh v. Saugerties*, 70 Hun (N. Y.) 589.

In the *New York* Law of 1886, ch. 572, which limits to one year actions against a municipality for personal injury, the requirements of notice, etc., is not inconsistent with that of the Buffalo charter requiring presentation of the claim to the common council, and must nevertheless be complied with. *Curry v. Buffalo*, 135 N. Y. 366.

Existence of a hole in a sidewalk for two or three weeks, was held sufficient to charge the town with notice. *Foels v. Tonawanda* (Supreme Ct.), 27 N. Y. Supp. 113.

Existence of a hole in a sidewalk for four years, was held to show negligence of the municipal officers. In this case, an action for the breaking of both bones of a leg in a hole in a sidewalk, a verdict for \$5000 was held not to be excessive. *Beltz v. Yonkers* (Supreme Ct.), 26 N. Y. Supp. 106.

Municipal officers may properly await a change of temperature before entirely clearing a sidewalk of ice. *Durr v. Green Island*, 71 Hun (N. Y.) 260; *Kleng v. Buffalo*, 72 Hun (N. Y.) 541; *Taylor v. Yonkers*, 105 N. Y. 206; 59 Am. Rep. 492.

The highway commissioner's knowledge of a long existing excavation without guard, was held sufficient to impose liability upon the town for a consequent personal injury. *Smith v. Clarkstown*, 69 Hun (N. Y.) 155.

The knowledge of the superintendent employed by commissioners of village

water-works, of a street defect, was held to be that of the village, and to render it liable for a consequent injury. *Deyoe v. Saratoga Springs*, 1 Hun (N. Y.) 341.

The *New York* Law of 1889, ch. 453, did not diminish the duties of highway commissioners. That of 1881, ch. 700, substituted the corporate liability of the town for the individual liability of the courts. That of 1890, ch. 568, § 16, made the town liable for injury from a defect existing through the commissioners' negligence. *McGuinness v. Westchester*, 66 Hun (N. Y.) 356.

The *New York* Law of 1881, ch. 700, transfers from the town to the highway commissioner the liability for injury from his neglect of duty, although that officer still must make reparation. Thus, the liability of a town for a defective highway is commensurate with that of the highway commissioners before the act. *Bryant v. Randolph*, 133 N. Y. 70. Compare *Clapper v. Waterford*, 131 N. Y. 382; *Glasier v. Hebron*, 131 N. Y. 447; *Whitney v. Ticonderoga*, 127 N. Y. 40.

In an action for injuries from a bridge defect, the plaintiff cannot adduce evidence of repairs made by the town highway commissioner after the accident. *Getty v. Hamlin*, 127 N. Y. 636.

The fact that a railroad company is, in the first instance, to determine the method of restoration of a highway crossing, does not exonerate a town from liability for injuries from the dangerous steepness or sharpness of curve of the approaches. *Bryant v. Randolph*, 14 N. Y. Supp. 844; 60 Hun (N. Y.) 581. Under the statutory limitation of six years, a highway loses its legal character as such, if impassable for that period, although the non-user was first caused by a trespasser. *Horey v. Haverstraw*, 124 N. Y. 273.

The rule that long continuance of the bad condition is not proof that the highway was not dangerous, was applied in an action against a town for injury from a sleigh slipping off an embankment without other fender than an earth filling at a diagonal water-bar. *Lane v. Hancock*, 67 Hun (N. Y.) 623. Compare the case of a sand pile remaining five months. *Tiers v. New York* (Supreme Ct.), 26 N. Y. Supp. 688.

A town is not obliged to prepare the entire width of the highway for the public use. One driving a top-heavy loaded sleigh upon the untraveled portion,

was held chargeable with contributory negligence, notwithstanding an alleged encroaching fence-post. *Cleveland v. Pittsford*, 72 Hun (N. Y.) 552.

Whether one's driving his truck upon a portion of the approaches to a bridge intended for foot passengers only, would preclude his recovery of the municipality for his injury from the structure's giving way, see *Fisher v. Cambridge*, 133 N. Y. 527.

Whether a stone placed in a street to protect a tree from vehicles is an obstruction for which the village is liable, is a question for the jury. *Dougherty v. Horseheads* (Supreme Ct.), 26 N. Y. Supp. 642.

The fact that a street-railway company had torn up the street and an injunction had been applied for, was held not to relieve a municipality from liability for personal injury from a defective crossing. *Dale v. Syracuse*, 71 Hun (N. Y.) 449.

A municipality was held not to be liable for an injury to a pedestrian who, in the night, stepped in a drainage opening between the ends of two curbstones not on the sidewalk nor at the termination of a cross-walk. *Harrigan v. Brooklyn*, 67 Hun (N. Y.) 85.

An abutter has no vested interest in the grade of a street as established. His right to recover for change thereof depends entirely upon statute. *Smith v. White Plains*, 67 Hun (N. Y.) 81.

A pedestrian injured by an ice formation from an unauthorized awning over a sidewalk, must seek a remedy against the municipality and not against the proprietor. *McConnell v. Bostelmann*, 72 Hun (N. Y.) 238.

An abutter interfering with a sidewalk—*e. g.*, by water from a locomotive tank freezing—was held liable to a woman injured by failure to restore it to a safe condition; she need not sue the municipality. *Thuringer v. New York Cent., etc., R. Co.*, 71 Hun (N. Y.) 526. So, also, as to obstructing by goods. *McCarten v. Flagler*, 69 Hun (N. Y.) 134.

Requisites of procedure under *New York Law of 1890*, ch. 561, in an action against the municipality for a personal injury, are found in *Eagan v. Rochester*, 68 Hun (N. Y.) 331.

In an action for injury from an icy sidewalk, evidence of the cause of the accumulation is not admissible without allegation in the complaint. *Woolsey v. Ellenville*, 69 Hun (N. Y.) 489. The complaint must allege notice and presentation of the claim under the *New*

York Village Law of 1889, ch. 440. *Arthur v. Glens Falls*, 66 Hun (N. Y.) 136.

A pedestrian's knowledge of an icy sidewalk before the accident, was held to preclude recovery for a personal injury. *Weston v. Troy*, 139 N. Y. 281. Compare *Kleng v. Buffalo*, 72 Hun (N. Y.) 541.

A village was held to be liable for an injury from a defective sidewalk, although the trustees were primarily responsible for its condition. *Haskell v. Penn Yan*, 5 Lans. (N. Y.) 43.

The acceptance of an abutter's sidewalk by a village may be shown by the trustees' acquiescence in its use, rendering the village liable for an injury from its defects. *Hiller v. Sharon Springs*, 28 Hun (N. Y.) 344.

A village having power to repair streets and prevent obstructions, was held liable for an injury from a defective sidewalk built without its authority. *Saulsbury v. Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122.

A village permitting, for three weeks, drippings to accumulate and freeze three feet high on a sidewalk, was held liable for consequent injury to a pedestrian. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

Further, as to what facts the jury are to consider in determining the liability of a town or village for injuries from alleged highway defects, see the case of an unguarded ravine bridge. *Maxim v. Champion*, 50 Hun (N. Y.) 88. For a case of commissioners' knowing that fenders had been washed away, see *Fay v. Lindley*, 58 Hun (N. Y.) 601; a case of a horse's stumbling on loose stones and being precipitated down an embankment, *Reid v. Ripley*, 59 Hun (N. Y.) 628.

A town was held not to be liable for injuries from an obstruction in a highway, consisting of a culvert over an overflow passage from the New York City aqueduct, built by that city under legislative authority. *Riley v. Greenburgh* (Supreme Ct.), 3 N. Y. Supp. 322.

As to the liability of a municipality to a mill owner for pollution from a defective sewer, see *Schrivver v. Johnston*, 71 Hun (N. Y.) 232.

A municipality neglecting after notice to change its plan of a sewer, was held liable to one consequently injured. *Munk v. Watertown*, 67 Hun (N. Y.) 261.

A village is not liable to an insurance company for the destruction of insured property through the insufficiency of the water supply to extinguish fire.

Springfield F., etc., Ins. Co. v. Keeseville (Supreme Ct.), 26 N. Y. Supp. 1094.

As to the liability of a municipality to a riparian neighbor for diversion of a stream, see *Ordway v. Canisteo*, 66 Hun (N. Y.) 569.

A municipality was held liable for injury to private property from the noise and vibration of pumping works. *Morton v. New York*, 140 N. Y. 207.

As to the liability of a municipality for nuisance of discharge of rockets, see *Speir v. Brooklyn*, 139 N. Y. 6. As to the liability to a pier owner for dumping, necessitating extra dredging, see *Hill v. New York*, 139 N. Y. 495.

In *Ohio*, as to a landowner's remedy for damages in the locating of a township road, etc., see *Frevort v. Finrock*, 31 Ohio St. 621.

The statutory requirement that a village shall cause the streets "to be kept open and in repair and free from nuisance," was held not to render it liable for a personal injury from its authorities' neglect to prevent a disorderly assemblage from firing a cannon therein. *Robinson v. Greenville*, 42 Ohio St. 925; 51 Am. Rep. 857.

In *Pennsylvania*, a township is liable for a personal injury from a defective road kept open by its authorities, although on ground condemned by a railroad company. *Aston Tp. v. McClure*, 102 Pa. St. 322. A township is liable for a defect in a highway substituted by a railroad company, but under the township's care. *Dalton v. Upper Tyrone Tp.*, 137 Pa. St. 18. A township is not liable for damages from a latent defect in a bridge, unless the supervisors had notice thereof and a reasonable time to repair. *Zimmerman v. Cone maugh* (Pa. 1886), 2 Cent. Rep. 361.

Under the local act (*Pennsylvania L.* 1869, p. 625), imposing on "each taxpayer" the duty of making and repairing foot-walks (his bill therefor to be deducted by the supervisors from his road tax), the township was held not to be liable for personal injuries from a defect therein. *Chartiers Tp. v. Langdon*, 114 Pa. St. 541; *Langdon v. Chartiers Tp.*, 131 Pa. St. 77.

A township was held not to be liable for damages from an overflow caused by an error of judgment of its supervisors, in the erection of a bridge. *Shieb v. Collier Tp.* (Pa. 1887), 11 Atl. Rep. 366.

The township, and not the borough,

is liable for personal damages from water thrown upon a highway by a borough, if the township had accepted the burden. *West Bellevue v. Huddleston*, 1 Mon. (Pa.) 129.

A township is bound to construct a highway or bridge only according to its probable use in view of the common travel and business over it. A traction engine thereon was held to be a nuisance. *Com. v. Allen*, 148 Pa. St. 358.

The rule that a municipality is not required to assume that its bridges will be used in an extraordinary manner, was applied to an action to recover of a township for the breaking down of a steam traction threshing machine. *Clulow v. McClelland*, 151 Pa. St. 583, following *McCormack v. Washington Tp.*, 112 Pa. St. 583.

A municipality is not bound to take precaution against extraordinary conjunction of circumstances; *e. g.*, that a traveler familiar with a road and stone-pile, will so drive that his horses, startled by the firing of guns, will crush his leg. *Hieffer v. Hummelstown*, 151 Pa. St. 304.

A municipality is not bound to pave a street to meet the requirement of a new and unusual use or wants special to a particular abutter. One opening a rag and paper warehouse on a narrow alley paved with cobble stones, and getting it into bad condition with heavy teams, was held not entitled to recover of the municipality for a consequent injury to a horse and truck. *Megargee v. Philadelphia*, 153 Pa. St. 340.

A traveler assuming a known risk, and driving with loose rein upon an embankment slope at a road curve, was held not entitled to recover from the township for the consequent injury. *Mueller v. Ross Tp.*, 152 Pa. St. 399. *Compare Lynch v. Erie*, 151 Pa. St. 381.

One knowing of a defect in a corduroy road, yet assuming the risk of upsetting his wagon by driving over it, was held not entitled to recover of the township for the consequent injury. *Winner v. Oakland Tp.*, 158 Pa. St. 405.

A township was held not liable for the almost impassibility of a public road, due to wet weather and miry soil. *Brendlinger v. New Hanover Tp.*, 148 Pa. St. 93.

A municipality was held liable for negligently allowing material, in grading a street, to fall upon an abutter's garden and shrubbery. *Gardner v. Scranton City*, 1 Pa. Dist. Rep. 805.

As to what is due care on the part of a municipality in leaving a pool or well open to access by children on the public grounds, see *Barthold v. Philadelphia*, 154 Pa. St. 109.

As to whether a municipality is liable for an injury or death from allowing the repeated placing of machinery and castings on a sidewalk, see *Davis v. Corry*, 154 Pa. St. 598.

The duty of a township to guard a highway is not affected by the concurrent use of the way as a log-way. *Kelly v. Mayberry Tp.*, 154 Pa. St. 440.

A municipality leaving for weeks a street water-pipe or stop-cock so out of repair as easily to frighten horses, was held liable for a consequent personal injury. *Baker v. North East Borough*, 151 Pa. St. 234.

Notice to a person, prior to his election as burgess, of a defect in a sidewalk, was held not to render the borough liable. *Lohr v. Philipsburgh*, 154 Pa. St. 246.

A municipality was held liable for damage to an abutter's land from an overflow caused by the negligent construction of a bridge. *Krug v. St. Mary's*, 152 Pa. St. 30, *following Al-lentown v. Kramer*, 73 Pa. St. 406.

Further, as to municipal liability for injuries from a defect in a sidewalk, see *Feather v. Reading*, 155 Pa. St. 187.

A township was held not to be bound so to build a bridge as to support a steam threshing machine transported by a traction engine. *McCormick v. Washington*, 112 Pa. St. 185.

Where a woman's horse took fright at piles of lumber projecting into the highway, ran away, and was killed, it was held that the township was not exonerated from liability merely because the person causing the nuisance was also responsible. *North Manheim Tp. v. Arnold*, 119 Pa. St. 380.

Where a road was fifteen feet wide and sufficiently passable, a township was held not to be liable for an injury from a horse's taking fright at a long pile of quarry-stones. *Jackson Tp. v. Wagner*, 127 Pa. St. 184.

A borough was held not to be liable to an abutter for damage from an overflow of a natural water-course from a highway in possession of a turnpike company, without proof of having assumed control thereof. *Buchert v. Boyertown* (Pa. 1889), 17 Atl. Rep. 190.

A township having authority to build a superstructure to render safe a railway's bridge, is liable for an injury from

a defect in such superstructure. *New Tp. v. Davis*, 77 Pa. St. 317.

A township is not exonerated from liability for injuries from its omission to erect barriers necessary for the safety of travelers, by its want of power to tax itself beyond one per cent. on the county valuation. *Scott Tp. v. Montgomery*, 95 Pa. St. 444.

A township was held liable for an injury from a defect primarily caused by a railway company, but allowed to continue. *Aston v. McClure*, 102 Pa. St. 302.

As to what circumstances the jury are to consider in determining the town's liability for injuries from an alleged highway defect, see *Easton v. Neff*, 102 Pa. St. 474; 43 Am. Rep. 213.

In *Rhode Island*, a town allowing snow, after twenty-four hours, to obstruct a team in a highway, is finable not less than \$10, nor more than \$100, unless the surveyor had begun removal, and completes it within three days. *Rhode Island Pub. Stat.* (1882), p. 172.

A town or city charged with a public duty in consideration of valuable privileges, is liable to a person suffering special injuries from its neglect of such duty; as to the application of the doctrine of *respondet superior* therein, see the case of a street rendered unsafe by the water commissioners throwing a stream from a hydrant, frightening horses. *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434.

A town is liable for personal injury from a highway defect, although an accident—*e. g.*, rain falling and freezing on loosened cobble-stones—occurred as a proximate cause, if, without the defect, such disaster would not have resulted. *Hampson v. Taylor*, 15 R. I. 83.

A *Rhode Island* statute of 1798, required towns to keep highways "safe and convenient for travelers at all seasons." The court declined to lay it down as a rule of law that treading down snow so the sidewalk be not blocked up, was sufficient; it is for the jury to determine from the circumstances of each case. *Providence v. Clapp*, 17 How. (U. S.) 161.

The statute requiring towns to keep highways in good repair, was held not to apply to a large show-board falling upon a pedestrian. *Taylor v. Peckham*, 8 R. I. 349.

No notice to a town in *Rhode Island* was necessary to render it liable for an injury from a highway defect.

Hull v. Richmond, 2 Woodb. & M. (U. S.) 337.

An abutter cannot maintain an action against the town for damages from the escape of surface water from the highway, resulting from usual change of grade presumably contemplated and paid for at the laying out. Wakefield v. Newell, 12 R. I. 75; 34 Am. Rep. 598. Otherwise, if from unusual change thereof. Inman v. Tripp, 11 R. I. 520.

In Vermont, where the county court ordered a bridge to be built at the joint expense of four towns, and the town at which one end was located maintained the approach thereto at its own expense, it was held that all four were liable for a personal injury from a defect in such approach. Tyler v. Williston, 62 Vt. 269.

A town is not liable for an injury which is the result of causes that common sagacity and forecast on the traveler's part could have anticipated and provided against. Noyes v. Morristown, 1 Vt. 353; Briggs v. Guilford, 8 Vt. 264; Lester v. Pittsford, 7 Vt. 158; Kelsey v. Glover, 15 Vt. 708.

A town is not liable for an injury or death resulting from the insufficiency of a road that has never been accepted by it or dedicated to public use. So held, where, owing to the impassability of a bridge during repairs, the highway surveyor and others, without official direction, repaired an old fordway, and a physician, for considerations of haste, preferring the fordway to a circuitous route, though knowing the stream was rapidly rising, drove in and was drowned. Hyde v. Jamaica, 27 Vt. 443.

A town's responsibility as to the removal of private property from a highway when consisting of objects liable to scare horses—*e. g.*, charred bales of hay near a railway depot—is higher than in case of objects incident to the soil and country. Morse v. Richmond, 41 Vt. 435; 98 Am. Dec. 600.

The rule restricting a town's liability as to the traveled portion of the highway, was applied in a case of injury to a pedestrian from a defect in the planking of the platform of an old hay-scale, over which at fifteen feet distance from the regular cart rut was, for twenty years, a natural footpath, which the town had never assumed to keep in repair. Whitney v. Essex, 38 Vt. 270.

In an action by a tin peddler for an injury caused by a defect in a "neighborhood road," evidence that the highway

surveyor told him that after passing a certain other defect he could "get along safe enough," was held admissible. So, also, evidence of the surveyor's official means to make repairs seasonably. Clark v. Corinth, 41 Vt. 449. So, also, is admissible parol evidence of acts of the town officers. Emery v. Washington, Brayt. (Vt.) 130. So, also, in an action for injury from a defect in a new road, evidence that the selectmen had discontinued the old road; and this, though some other person had torn away their fence across the new one; they knowing and not replacing. Blodgett v. Royalton, 17 Vt. 41; 42 Am. Dec. 476. But evidence of mere consent by the selectmen that one may travel on a road, will not render the town liable for an accident; there must have been some act recognizing it as a highway. Blodgett v. Royalton, 14 Vt. 288. As to what is tantamount to a formal opening of a highway rendering the town liable for defects therein, see Whitney v. Essex, 42 Vt. 520.

No action lies under Vermont Gen. Stat., ch. 25, § 41, making two towns jointly liable for an injury from a defect in a bridge erected by them, if only one of the towns has received the statutory notice. Brown v. Fairhaven, 47 Vt. 386.

The statutory prohibition of fast driving upon a bridge, was held not to apply to one driving faster than a walk upon the approaches, so as to prevent his recovering for injuries from a defect in a trestle. Weeks v. Lyndon, 54 Vt. 638.

A village's acceptance of a charter, giving it merely supervision of the highway, was held not to impose thereon liability for an injury from a highway defect. Parker v. Rutland, 56 Vt. 224.

A town is liable for an injury from a defect in a margin which its authorities have suffered to become, by use or otherwise, a part of the roadway. Potter v. Castleton, 53 Vt. 435.

A town was held to be liable for an injury to a traveler from the defective condition of a so-called winter road, running parallel with an impassable highway, and used by the public for many winters. Coates v. Canaan, 51 Vt. 131.

Further, as to what circumstances the jury are to consider in determining the "sufficiency" of a highway, see a case involving the width of a track beaten in snow, Sessions v. Newport, 23 Vt.

9; *Barton v. Montpelier*, 30 Vt. 650; a case of coasting not forbidden by the selectmen; *Hutchinson v. Concord*, 41 Vt. 271; 98 Am. Dec. 584; ground sinking through a latent defect, *Prindle v. Fletcher*, 39 Vt. 255; purposes of a "pent road," *Loveland v. Berlin*, 27 Vt. 713; a log, although not in a space not embraced in the original road survey, *Bagley v. Ludlow*, 41 Vt. 425; descending a hill with horses smoothshod behind, and wheels unconfined, *Allen v. Hancock*, 16 Vt. 230; abutter's excavation outside the traveled track, *Rice v. Montpelier*, 19 Vt. 470; an unguarded embankment six inches outside the highway, *Drew v. Sutton*, 55 Vt. 586; 45 Am. Rep. 644; running away habits of a team, *Cheney v. Ryegate*, 55 Vt. 499.

In *Wisconsin*, towns are liable for damages from highway defects, in proportion to their responsibility for repairs. *Wisconsin Annot. Stat.* (1889), § 1339.

A town is liable for injuries from its neglect to notify travelers against using a side track as accessible and as much traveled as the prepared track. *Cartright v. Belmont*, 58 Wis. 370.

A town cannot escape liability for a fatal injury from a defect in a highway, by the facts that it had a remedy over against its officers, and that its means of repair were inadequate. *Burns v. Elba*, 32 Wis. 606.

A town is liable for injury from a defect in a highway, if in the worked and traveled part, though wide enough for three teams abreast. *Matthews v. Baraboo*, 39 Wis. 674.

The statutory liability refers only to roads and bridges that are public highways, which the town is bound to repair. *Green v. Bridge Creek*, 38 Wis. 450; 20 Am. Rep. 18.

In an action against a town for injuries from a defect in a bridge, it may be shown that at other points it was out of repair. *Spearbracker v. Larabee*, 64 Wis. 573.

A town and a village, were held to be jointly and severally liable for a fatal injury to one navigating a stream, caused by the negligent management of the draw of a bridge controlled by them. *Weisenberg v. Winneconne*, 56 Wis. 667.

One injured upon a temporary passageway around snow-drifts, was held to be chargeable with knowledge, that the overseer, though working with the approval of the town supervisors, had

no authority to work it as a public highway. *Bogie v. Waupun*, 75 Wis. 1.

A town sued for injury from a horse's taking fright in the evening at an object in the road—*e. g.*, a mortar-box—may not show that horses went by during the day without fright. *Bloor v. Delafield*, 69 Wis. 273.

A traveler familiar with the locality, and venturing to cross a stream swollen by an extraordinary freshet, must use care commensurate with the risk. *Hopkins v. Rush River*, 70 Wis. 10.

The *Wisconsin* Law of 1889, ch. 471, making a town or city liable for injury from a street defect, applies to a case of injury from a defect caused by negligence or default of a person, whether or not sustaining a contract relation to the town or city. *Kollock v. Madison*, 84 Wis. 458.

A town was held to be liable for injuries causing the death of a pedestrian, from stepping upon an upturned nail in a board near a sidewalk. *Pittenger v. Hamilton* (Wis. 1893), 55 N. W. Rep. 423.

The fact that the owner of a store, in front of which he had been permitted to put a hatchway in the sidewalk, was not properly guarding it when open at the time of an accident, was held not to exempt the municipality from liability for the consequent personal injury. *McClure v. Sparta*, 84 Wis. 269.

As to liability for an injury from the deposit of matter in the street, see *Raymond v. Keseberg*, 84 Wis. 302. In this case it was held that the right of a lot owner in a city, when building, to deposit building materials and earth upon the adjoining street, is the right of an abutter as such alone and not as an owner of the fee of any part of the street. It is therefore founded on and limited by reasonable necessity, to be determined, in the absence of municipal regulations, by the circumstances of each particular case. In an annotation of this case in 19 L. R. A. 643, it is said that this decision seems to be the first expressed decision on the subject. The note says that the doctrine of the case cannot be deemed in any sense doubtful or in conflict with any of the reported decisions of the courts; and reference is made in the note to *Wood v. Mears*, 12 Ind. 515; 74 Am. Dec. 222; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; 32 Am. Dec. 261; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Mallory v. Griffey*, 85 Pa. St. 275; *Hundhausen v. Bond*, 36 Wis. 29.

b. COINCIDENTAL PROXIMATE CAUSES.—There is a large class of torts wherein the town's negligence is but one of two coincidental proximate causes. The general rule in such cases may be simple, but its application to the widely various circumstances is multiplex. In the *New England* states, where the phraseology of the statutes defining the responsibility of towns for the condition of highways and bridges is quite similar or identical, the decisions have been quite uniform. Many cases, especially the later ones in the *New York* court of appeals, turn wholly upon the degree of improbability of the concurring causes, or the rarity and unexpectedness of the conjuncture.¹

As to responsibility for an injury from a depression left in the street in laying a gas-pipe, see *Grundy v. Janesville*, 84 Wis. 574.

A town was held not liable for damages from a surface-water overflow. *Champion v. Crandon*, 84 Wis. 405.

As to when failure of a municipality to remove ice from a sidewalk crossing is not actionable negligence, see *Chamberlain v. Oshkosh*, 84 Wis. 289. Further, as to injury from a defective sidewalk, see *Woodward v. Boscobel*, 84 Wis. 226.

A plaintiff's knowledge of the tendency of ice formation in the locality of the sidewalk accident, was held to constitute contributory negligence, precluding recovery from the municipality. *Hausman v. Madison* (Wis. 1893), 55 N. W. Rep. 167.

In an action for injuries from a defective street, a general denial throws on the plaintiff the burden of proving the statutory filing of statement for the town board. *Eron v. Stevens Point* (Wis. 1893), 55 N. W. Rep. 410.

The fact that a child seven years old was using a sidewalk for play as well as travel at the moment of the accident, will not prevent her recovery of the municipality for the defect that caused the injury. So held as to her rolling a hoop on her way to join her playmates. *Reed v. Madison*, 83 Wis. 171.

As to what are admissible special interrogatories to the jury in an action by a child against a municipality for injuries from a defect in a sidewalk, see *Reed v. Madison* (Wis. 1893), 56 N. W. Rep. 182.

Further, as to what circumstances the jury are to consider in determining a town's liability for injuries from an alleged highway defect, see the case of a runaway horse, *Goldsworthy v. Linden*, 75 Wis. 24.

As to what circumstances the jury are to consider in determining whether

a highway is "safe," see a case concerning boulders outside the traveled path. *Wheeler v. Westport*, 30 Wis. 392.

Where epilepsy developed in consequence of one's exposure and agitation in striving in vain to rescue his horses that had fallen into a stream, because of a defect in a bridge, a verdict for him against the town for \$700 was held not to be too excessive. *Jaquish v. Ithaca*, 36 Wis. 108.

Failure to give to the municipal authorities the formal statutory notice of the highway defect, was held not to defeat an administrator's recovery for the consequent death of the intestate; notice to one alderman sufficing. *McKeigue v. Janesville*, 68 Wis. 50.

The burden of proving actual notice to the town is on the plaintiff. *Bailey v. Spring Lake*, 61 Wis. 227.

A finding that the defendant municipality had "no notice" of the defective condition of the sidewalk before the accident, was held to negative both actual and constructive notice; and to be no ground for reversal for mere evidence that the street commissioner had ordered the abutting owner to repair the walk at another point. *Bergevin v. Chippewa Falls*, 82 Wis. 505.

As to the requisites of notice under *Wisconsin* Rev. Stat., § 1339, also of allegation and proof on the issue whether a steamboat on wheels was a street obstruction naturally calculated to frighten horses, see *Cairncross v. Pewaukee*, 78 Wis. 66. As to what defect in a road culvert will render a town liable for a consequent personal injury, see *Rumrill v. Delafield*, 82 Wis. 184.

Further, as to the requisites of the notice to the town authorities of injury from an alleged highway defect, see *Weber v. Greenfield*, 74 Wis. 234.

1. See *NEGLIGENCE*, vol. 16, p. 441; *HIGHWAY*, vol. 9, p. 376 *et seq.*

In *Vermont*, the statutory expression

being "good and sufficient repair," *Vermont* Rev. L. (1880), § 3043, in an old and still leading case, *Hunt v. Pownal*, 9 Vt. 411, where the concurring cause of the disaster was the unscrewing of a nut from a tongue-bolt, the court, by Redfield, J., said: "In every case of damage, occurring on the highway, we could suppose a state of circumstances, in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is to guard against these constantly occurring accidents, that towns are required to guard, in building highways." The law hereon is not altered by *Vermont* Sess. L. (1882), No. 13, as to "insufficiency" of any bridge, etc. *Willard v. Sherburne*, 59 Vt. 361.

In *Vermont*, moreover, a town has been held to be liable for injuries received by a traveler while trying to extricate his horse that had broken through a defective bridge. *Stickney v. Maidstone*, 30 Vt. 738. But it has there been held that a town is not liable for an injury caused by a traveler's voluntary divergence from the traveled path. *Rice v. Montpelier*, 19 Vt. 470. Otherwise, if he be forced into the ditch by accident, and the injury result from an obstruction lying there. So held, where a traveler's horse, passing a saw-mill at a point where a log was high on one side of the traveled path, swerved, and, being suddenly reined in, sprang and threw the wagon-wheel against a sled-crook in a slight ditch on the other side. *Cassedy v. Stockbridge*, 21 Vt. 391.

In *Missouri*, the foregoing words of Judge Redfield, in *Hunt v. Pownal*, 9 Vt. 411, were quoted with approval in *Hull v. Kansas City*, 54 Mo. 598; 14 Am. Rep. 487, a case where the concurrence was the entanglement of the traveler's lines by his horse's tail, and a case having the same concurring entanglement, *Fogg v. Nahant*, 98 Mass. 578, was distinguished under the statute.

In *Massachusetts*, the statutory expression being "reasonably safe and convenient for travelers" (*Massachusetts* Pub. Stat. (1882), p. 347, § 1), the town is not liable, if the primary cause of the disaster was the uncontrollability of the traveler's horse. *Titus v. Northbridge*, 97 Mass. 258; 93 Am. Dec. 91; *Babson v. Rockport*, 101 Mass. 93.

Compare the case of entangled leading-lines, *Fogg v. Nahant*, 98 Mass. 578.

A town may be liable for a defect or obstacle in a highway, although the innocent act of a third person—*e. g.*, an approaching wagon-driver causing the entanglement of a telephone wire—concurrent in causing the injury. *Hayes v. Hyde Park*, 153 Mass. 514.

A town is not liable for injury to a traveler, if it cannot be determined what part resulted from a highway defect, and what part from his own negligence. *Horrigan v. Clarksburg*, 150 Mass. 218.

A traveler may recover of a town for injuries from the insufficiency of the height of a wall as a barrier, when his horse had taken fright. *Hinckley v. Somerset*, 145 Mass. 326.

A town was held not to be liable for injuries to a traveler from his horse's taking fright at a stone pile in the grass within the limits of the highway. *Bemis v. Arlington*, 114 Mass. 507.

A town is not answerable to a traveler for injury from any defect in a highway for which it would not be liable to indictment, and *vice versa*. So held, where a horse, frightened by a whippetree's becoming unbolted and hitting his legs, ran against loose stones nearly eight feet from the cart-rut of a highway, thirty-four feet wide. *Howard v. North Bridgewater*, 16 Pick. (Mass.) 189.

See the case of a frightened horse, in *Howe v. Lowell*, 101 Mass. 99; and that of a traveler injured in leaping from his carriage while the horse was struggling to rise from a fall at a defective stop-water, *Sears v. Dennis*, 105 Mass. 310. Imperfect vision in a traveler's horse, if one suitable to be driven, will not preclude recovery for injury from a defective highway. *Wright v. Templeton*, 132 Mass. 49.

A town would not be liable for an injury caused solely by the selectmen's acting as a statutory board; *e. g.*, putting up a bright-red drinking trough. Otherwise, if a horse, frightened thereat without the traveler's fault, draws the carriage into a highway defect, causing his injury. *Cushing v. Bedford*, 125 Mass. 526.

If one is carefully traveling on a dark night in a narrow highway, and, to avoid an unrailed embankment on the right, turns to the left, thereby colliding with an approaching carriage, he may recover of the town for the consequent injury. *Flagg v. Hudson*, 142 Mass. 280; 56 Am. Rep. 674.

In an action for injuries from the falling of the span of the portion of a Merrimac bridge that a town was bound to maintain, evidence was held admissible that the cause of the fall was the accumulation of snow, or excessive weight of planking, or defect of the iron work, or all these causes combined. *Whitman v. Groveland*, 131 Mass. 553.

One cannot recover of a municipality for injury from a defect, if his own unlawful act concurred therein. So held where the plaintiff, while intoxicated, was violating an ordinance against driving over a bridge faster than a walk. *Heland v. Lowell*, 3 Allen (Mass.) 407; 81 Am. Dec. 670. Compare *Tuttle v. Lawrence*, 119 Mass. 276.

In an action against a town for personal injuries from a defective highway, an instruction that plaintiff could not recover if without drunkenness he would not have been injured, was held proper. *Lofus v. North Adams* (Mass. 1893), 35 N. E. Rep. 674.

In *Maine*, the statutory expression being "safe and convenient for travelers," (*Maine* Rev. Stat. (1883), p. 251, § 52), the town was held not to be liable for injury from a defective bridge, where the primary cause was the startling of the horse by an animal's jump into the stream. *Moulton v. Sanford*, 51 Me. 127. Upon the question of causation, the words "through the defect," etc., were considered. Compare *Coombs v. Topsham*, 38 Me. 204. For a review of the *Maine* statutory provision concerning causation, the duty of the traveler as to notice, etc., see *Haines v. Lewiston*, 84 Me. 18, stated in the last note.

Where the wrought part of a highway was sufficiently wide for safe transit, but a traveler's horse, meeting cows with boards on their horns, became frightened and ran the wagon against a blasted rock within the highway limits, it was held that the town was not liable for his consequent injury. *Perkins v. Fayette*, 68 Me. 152.

A town was held liable for injury to a horse from the miry condition of a roadside watering place, although an unskillful woman was the driver. *Cobb v. Standish*, 14 Me. 198.

Under *New Hampshire* Pub. Stat. (1891), p. 224, § 1, "Towns are liable for damages happening to any person, his team, or carriage traveling upon a highway or bridge thereon, by reason of any obstruction, defect, or insufficiency, or want of repair which

renders it unsuitable for travel thereon." In the leading case the concurrence was a latent defect in the traveler's wagon, and the town was held to be liable. *Winship v. Enfield*, 42 N. H. 197.

A town was held liable for the injury suffered by one's tripping on a stone improperly in the highway, but not for that caused by his thereupon falling into a cellar which he maintained as a nuisance. *Lavery v. Manchester*, 58 N. H. 444.

Where the overturning of a traveler's load from a highway defect, frightened his horses into escaping, and after running ninety rods, they collided with another traveler, the town was held to be liable for the consequent final injury, as natural and probable. *Merrill v. Claremont*, 58 N. H. 468.

In *Connecticut*, the statutory expression being "towns shall build and repair all necessary highways and bridges" (*Connecticut* Gen. Stat. (1888), § 2666), where the concurrence was a freshet, the town was held to be liable, even though, had the railing been higher, there would have been more danger that ice floes would sweep away the bridge. *Bronson v. Southbury*, 37 Conn. 199.

In *Rhode Island*, the statutory expression being "safe and convenient for travelers," where, at a curve in a road, having ample roadway, a hitching post was so placed with reference to the general course of travel as to be dangerous, it was held that the town was liable for a traveler's injuries from collision therewith at night, while trying to rein in his horse startled by a vehicle behind. *Yeaw v. Williams*, 15 R. I. 20. So, also, in case of another concurring accident for which no person was responsible. *Hampson v. Taylor*, 15 R. I. 83. But otherwise, where a collision with a post outside the traveled way occurred through an approaching driver's not sufficiently turning out. *Mahogany v. Ward*, 16 R. I. 479.

L. left carloads of castings in a highway, frightening the horse of B., a traveler, which ran away, throwing out B. and wife, who recovered of L. for the consequent injury, a judgment which was baffled by L.'s discharge in bankruptcy. It was held that B. and wife could recover of the town therefor, it and L. not being joint tortfeasors. *Bennett v. Fifield*, 13 R. I. 139; 43 Am. Rep. 17, *disapproving* on the question of proximate causes, the four *Mas-*

sachusetts decisions, *Kingsbury v. Dedham*, 13 Allen (Mass.) 186; 90 Am. Dec. 191; *Cook v. Charlestown*, 98 Mass. 80; *Bemis v. Arlington*, 114 Mass. 507; *Cook v. Montague*, 115 Mass. 571; and *approving Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600; *Winship v. Enfield*, 42 N. H. 217; *Chamberlain v. Enfield*, 43 N. H. 356; *Bartlett v. Hooksett*, 48 N. H. 18; *Dimock v. Suffield*, 30 Conn. 129; *Ayer v. Norwich*, 39 Conn. 376; 12 Am. Rep. 396; *Young v. New Haven*, 39 Conn. 435; *Foshay v. Glen Haven*, 25 Wis. 288.

In *Upper Canada*, the *New Hampshire* and *Vermont* cases have been followed. *Sherwood v. Hamilton*, 37 U. C. Q. B. 410.

In *Indiana*, so, also, where the concurrence was an unexpected fright of the traveler's horse. *Crawfordsville v. Smith*, 79 Ind. 308; 41 Am. Rep. 612.

A town that had licensed a person to maintain a tripod and a fire to make candy on a street, was held liable to a traveler injured by the frightening of a horse of ordinary gentleness. *Rushville v. Adams*, 107 Ind. 475.

In *Illinois*, so, also, upon concurrence of fright, etc., it being held, moreover, that where a sidewalk is devoted to the common use of vehicles and foot passengers, the municipality is bound to make it safe for both classes of travelers. *Lacon v. Page*, 48 Ill. 499.

And see a case where a horse shied, and through want of a bridge railing, the sleigh was precipitated to the ice below. *Rockford v. Russell*, 9 Ill. App. 229.

In *Iowa*, so, also, upon concurrence of fright, etc. *Manderschid v. Dubuque*, 25 Iowa 108.

There, also, a municipality was held liable for the breaking of a leg of a traveler's horse, by a heap of rubbish which had accumulated through the incapacity of a culvert. *Hazzard v. Council Bluffs*, 79 Iowa 106. But one cannot recover if his own negligence was one of the proximate causes of the injury. *Portman v. Decorah* (Iowa, 1893), 56 N. W. Rep. 512.

In *Wisconsin*, so, also, where the horse staggered in a fit, etc. *Houfe v. Fulton*, 29 Wis. 296. The fact that the frightened horse broke its bit, need not be taken into consideration. *Cairncross v. Pewaukee* (Wis. 1893), 56 N. W. Rep. 648.

In *Michigan*, where a traveler was killed by his horse becoming frightened at a locomotive and throwing the

buggy against a lumber pile that did not extend over the traveled portion of the street, which had thirty-one feet clear, it was held that the municipality was not liable. *McArthur v. Saginaw*, 58 Mich. 357; 55 Am. Rep. 687.

A township was held to be liable for injury to one trying to hold, till aid might arrive, a horse struggling with one foot caught in a bridge hole. *La Duke v. Exeter Tp.*, 97 Mich. 450.

Further, as to when a defect or obstruction is or is not the proximate cause of an accident to a horse otherwise frightened, see *Blail v. Detroit* (Mich. 1893), 57 N. W. Rep. 117; *St. Clair Mineral Springs Co. v. St. Clair*, 96 Mich. 463; *Langworthy v. Green Tp.*, 95 Mich. 93.

One cannot recover if his own negligence was one of the proximate causes of the injury. *Kuhn v. Walker Tp.*, 97 Mich. 306.

In *Mississippi*, where a pedestrian, being suddenly admonished by his companion of a defect in the sidewalk, necessitating a turn down steps, stumbled over a gutter, it was held that there was contributory negligence exempting the municipality from liability. *Vicksburg v. Hennessy*, 54 Miss. 391; 28 Am. Rep. 354, citing *Rusch v. Davenport*, 6 Iowa 443; *Raymond v. Lowell*, 6 Cush. (Mass.) 524. Compare the cases of the decayed sill of a street water-tank, *Nesbitt v. Greenville*, 69 Miss. 22; and of the frightened horse, *Butler v. Oxford*, 69 Miss. 618.

In *Georgia*, where a traveler's horse, frightened by a steam whistle, precipitated him down an embankment having no guard rail, it was held to be for the jury to determine the liability of the municipality. *Atlanta v. Wilson*, 59 Ga. 544; 70 Ga. 714. A municipality was held liable for a woman's personal injuries at night, from disrepair of a sidewalk, although she had declined her husband's offer to escort her. *Atlanta v. Martin*, 88 Ga. 21. So, also, notwithstanding the pedestrian's deviation from the line of the sidewalk, *Atlanta v. Buchanan*, 76 Ga. 585. But compare *Zettler v. Atlanta*, 66 Ga. 195. Also the case of noise of a street car preventing the pedestrian on an unlighted street from hearing a horse without a driver approaching, *Gaskins v. Atlanta*, 73 Ga. 746. Also the case of an extraordinary rainfall bursting a canal bank, thus destroying crops, *Savannah v. Cleary*, 67 Ga. 153. Also that of the frightened horse, Jack-

son v. Buena Vista, 88 Ga. 466. Also that of a peculiar culvert, Milledgeville v. Brown, 87 Ga. 596.

In *New York*, so, also, was the town held liable where, in the night, at a curve in the road, a traveler's horses kept straight on, precipitating the wagon down an unguarded embankment. *Ivory v. Deerpark*, 116 N. Y. 477. Otherwise, where the road was straight. Where it was seventeen feet wide, with a sloping declivity to a pond, and for ten feet unguarded by fence or bushes, a traveler, in daylight, stopped her cutter, and directed a boy that was driving an approaching sleigh, to come and pass. A barrel rolled from the sleigh, frightening her horse, which backed at right angles, and upset her into the water. She had long known the place to be unguarded. It was held that the town was not liable; that the duty of "active vigilance" of corporate authorities within the *New York* law, is only a relative term, reversing the decision of the supreme court herein, *Glazier v. Hebron*, 62 Hun (N. Y.) 137; *Glazier v. Hebron*, 131 N. Y. 447. So, also, where a horse, frightened by a bicycle, shied over a wide sidewalk, down an embankment, was the case held to fall within the "rare conjuncture class," for which the town or village ought not to be held liable; the requirement, in the *Yonkers* charter, of railings at an "exposed place" meaning a place dangerous as applied to not improbable accidents. *Hubbell v. Yonkers*, 104 N. Y. 434.

In *Monk v. New Utrecht*, 104 N. Y. 552, the court, by Ruger, C. J., said: "No possible difficulty existed in this case to prevent a traveler from following either the road or sidewalk by marks which could both be seen and felt, and it would be imposing a burden beyond all precedent to require a town to remove irregularities in the surface of the land, outside of the road, for fear that some traveler might wander there and thus sustain injury."

In *New York*, moreover, it has been a general rule, that in case of concurrent proximate causes of a highway accident, it must not be attributed to one without the operation whereof it would not have happened. So held, where the driver of a frightened blind horse, in avoiding an ash-pile negligently permitted by the commissioner to remain on one side of the street, collided with a hydrant nozzle on the other side thereof. *Ring v. Cohoes*, 13 Hun (N.

Y.) 76; 77 N. Y. 83; 33 Am. Rep. 574.

A village was held liable for an injury to a traveler from his horse's taking fright at an advertising banner of seine-twine suspended across a street; and evidence was admissible that other horses had been frightened thereat. *Champlin v. Penn Yan*, 34 Hun (N. Y.) 33.

A town was held not to be liable for the death of a runaway horse that had got into an excavation between the roadway and an abutment, during a bridge repairing; the forlway being ordinarily safe without a barricade. *Stacy v. Phelps*, 47 Hun (N. Y.) 54.

As a general rule, in an action against a town for injury from a defective highway, a non-suit should not be granted merely for the contributory act of the plaintiff, if it was one as to the character of which men of ordinary prudence may differ. So held, where the driver of a wagon along a mountain pass, on being warned that he could not safely pass a certain snow-slide pile, truly replied that he could not turn back, and in proceeding the wagon was precipitated over the declivity. *Atwater v. Veteran*, 6 N. Y. Supp. 907; 52 Hun (N. Y.) 613.

In *Pennsylvania*, the *Vermont* rule prevails. On one side of a highway was a hole, in size over a cubic foot, and on the other, a pile of stones over twenty feet long, placed there by the town supervisor. Traveler's horse, after passing safely, was frightened by a loose donkey, and turning around, broke a wheel of the buggy, and the end of the axle striking the hole, they were thrown out against the stones. It was held that the township was liable. *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145. Similar accident, *Jackson Tp. v. Wagner*, 127 Pa. St. 184; 133 Pa. St. 61. Compare the *Fairmount Park* accident, *Hey v. Philadelphia*, 81 Pa. St. 44. See also *Worrlow v. Upper Chichester Tp.*, 149 Pa. St. 40; *Kieffer v. Hummelstown*, 151 Pa. St. 304.

A town was held to be liable for injury from want of a barrier, although one cause was the horse's taking fright at a steam thrasher near the road. *Burrell Tp. v. Uncapher*, 117 Pa. St. 353. But compare the case of an injury to a foot passenger from a runaway horse on a bridge having no barrier between the footway and the driveway. *Lehigh County v. Hoffer*, 116 Pa. St. 119.

A township was held liable for in-

VII. OFFICERS—1. Election or Appointment.—Ordinarily, the general statutes designate the town officers.¹ In some states, the legislature incorporating a town may appoint the officers to exercise their functions until a regular election.² The functions of an officer of a given title in one state may not be identical with those of the officer of that name in another state.³

juries from a frightened horse running on the railroad parallel with the highway, although the railroad company's negligence contributed to the result. *Plymouth Tp. v. Graver*, 125 Pa. St. 24.

A municipality should so guard by barriers the approaches to dangerous places that even skittish horses may be driven along the highway with safety. So held, where a railroad ran parallel with the street, and twelve feet below. *Pittston v. Hart*, 89 Pa. St. 389. So, also, where miners had made an excavation. *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 376. So, also, where the horse was frightened at a plank nailed over a hole in a bridge without railing. *Newlin Tp. v. Davis*, 77 Pa. St. 317.

1. See ELECTION, vol. 6, p. 255; PUBLIC OFFICERS, vol. 19, p. 417.

2. In *Virginia*, this is so, notwithstanding that *Virginia* Const., art. 6, § 20, provides that town officers shall be chosen by electors of such towns. *Roche v. Jones*, 87 Va. 484.

3. In *Alabama*, "The business of the corporation is managed by an intendant and five councilors, who are styled the corporate authorities of the town and hold office for one year," etc. *Alabama* Code (1886), § 1491. The three township trustees appointed by the county superintendent of education, perform the same duties as those formerly required of the town superintendent. *Alabama* Acts (1891), p. 554.

Where, under an erroneous belief that a town charter had been forfeited by non-user, there was an abortive re-incorporation and election by the sheriff for an intendant and councilmen, it was held that these were *de facto* officers, and that their successors, elected on their order, were *de jure* incumbents of *de jure* offices, their titles being derived from the first charter. *Butler v. Walker* (Ala. 1893), 13 So. Rep. 261.

As to the election of municipal officers, see *Anniston v. Davis* (Ala. 1893), 13 So. Rep. 331.

In *Arizona*, the board of county supervisors "shall appoint from the bona

fide tax-paying electors" of an incorporated township "three discreet persons as trustees of said corporation." *Arizona* Rev. Stat. (1887), § 154. This board of trustees appoints the marshal, the assessor, and the treasurer, § 161.

In *Arkansas*, the corporate authority of a town "organized for general purposes, shall vest in one mayor, one recorder, and five aldermen," chosen by ordinary election and known as the council. *Arkansas* Dig. Stat. (1884), §§ 791, 792. The county court, and in some cases the governor, may appoint officers of a new township, § 6445. Every township shall have two justices of the peace, § 4017.

In *California*, the duties of the township assessor are like those of the county assessor; and he may appoint deputies, etc. *California* Pol. Code (1885), § 4109, note.

As to the election of officers in the six classes of municipal corporations respectively, under *California* Act of 1883, see *California* Pol. Code, p. 737.

In *Colorado*, the six town trustees are chosen at successive annual elections. This board appoints the recorder, treasurer, town attorney, and marshal. *Colorado* Annot. Stat. (1891), §§ 4508, 4513, 4520.

In *Connecticut*, "Each town shall annually elect selectmen, and such officers of local police as the laws may prescribe." *Connecticut* Const., art. 10, § 2. Tax assessors are not "local police." *Dibble v. Merriman*, 52 Conn. 214. If the number of assessors or members of the board of relief, or selectmen to be elected, be two, no person shall vote for more than one; nor, if three or four, for more than two; nor, if five or six, for more than three. *Connecticut* Gen. Stat. (1888), § 46. No town clerk or selectman can be registrar of voters, § 42. The selectman first named on a plurality of the ballots as actually cast is "first," and is *ex officio* town agent, § 48; *Mallett v. Plumb*, 60 Conn. 352.

In the *Dakotas*, "There shall be elected . . . one trustee from each district in the town, and also a clerk, assessor, treasurer, marshal, and justice

of the peace." *Dakota Comp. Laws* (1887), § 1036.

In *Florida*, each town, village, or hamlet elects annually a mayor, clerk, and marshal. The council consists of the mayor and not more than nine nor less than five aldermen. *Florida Rev. Stat.* (1892), § 661.

In *Georgia*, the town or village annually elects "a mayor, recorder, and five councilmen, who together shall form a common council;" each must be a resident thereof. *Georgia Code* (1882), § 779.

In *Idaho*, the first board of trustees is appointed by the county commissioners. The successors are chosen by the qualified electors of the town. *Idaho Rev. Stat.* (1887), § 2225. The board of trustees appoint the assessor, § 2239. The marshal, corporation counsel, etc., are elected by the qualified voters, § 2232.

In *Illinois*, "At the annual town meeting in each town, there shall be elected by ballot one supervisor (who shall be *ex officio* overseer of the poor), one town clerk, one assessor, and one collector, who shall severally hold their offices for one year and until their successors are elected and qualified, and such justices of the peace, constables, and highway commissioners as are provided by law;" also in certain towns having 4000 inhabitants, an assistant supervisor. *Illinois Rev. Stat.* (1891), p. 1498. To be eligible, one must be a legal voter, and a resident of the town for one year, p. 1502. The town highway commissioner is elected triennially, p. 1510.

A general act repealing all inconsistent provisions in earlier acts, was held, as to the election of town trustees, to prevail over a special act of incorporation. *Kelly v. Gahn*, 112 Ill. 23.

The disqualification of village trustees, arising from a tax debt, may be removed by payment after election. *People v. Hamilton*, 24 Ill. App. 609.

As to requisites of eligibility to a town office, see *Laimbeer v. People*, 48 Ill. 490.

A person eligible and duly elected to the office of town clerk, but refusing to assume the duties, may be compelled by *mandamus*. *People v. Williams*, 145 Ill. 573.

In *Indiana*, there is elected annually a town clerk and treasurer (who may be the same person), and "from each district" in the town, a trustee; this meaning for each district, but by the voters of the whole town. *Indiana*

Rev. Stat. (1888), § 3308; *Mullikin v. Bloomington*, 49 Ind. 62. Also, annually, a town marshal, § 3325. As to the procedure in the first election of trustees, see § 3311. Under the act of 1889, the township trustee may hold over until his successor is appointed, although ineligible for a new appointment. *State v. Bogard*, 128 Ind. 480.

One who has received a certificate of election as township trustee, given bond, and taken the qualifying oath, is entitled to the office, as against an incumbent whose term has expired, though another be contesting the election. *De Armond v. State*, 40 Ind. 469.

The offices of township trustee and supervisor of ways are lucrative, and cannot be held by the same person. *Creighton v. Piper*, 14 Ind. 182.

In *Iowa*, "The corporate authority of incorporated towns organized for general purposes, shall be vested in one mayor, one recorder, and six trustees, to be elected by the people, who shall be qualified electors residing within the limits of the corporation, and who shall constitute the council of the incorporated town. . . . The council of an incorporated town shall have power to provide by ordinance for the election of a treasurer, and such subordinate officers as they may deem necessary for the good government of the corporation, to prescribe their duties and compensation, or the fees they shall be entitled to receive for their services, and to require of them an oath of office and a bond, with surety, for the faithful discharge of their duties. The election of any such officer shall be at the regular annual election, and no appointment of any officer shall endure beyond one week after the qualification of the members of the succeeding council." *McClain's Iowa Code* (1888), §§ 698, 701.

Moreover, in each township, there shall be elected three trustees, one clerk, one assessor, two constables, and two justices of the peace; but where a city or incorporated town is situated in a township, the trustees of the township may order the election of one or two additional justices and constables, and at least one justice and constable shall reside within the limits of such city or town. *McClain's Iowa Code* (1888), § 526. As to the procedure in the election of assessors, see *McClain's Iowa Code* (1888), § 528. *State v. Finger*, 46 Iowa 25.

A township officer may be elected at

an adjourned meeting on a day later than that prescribed by the statute therefor. *Carter v. McFarland*, 75 Iowa 196.

In *Kansas*, the officers annually elected in each municipal township are one trustee, one clerk, one treasurer, constables equal to the number of justices, and one road overseer in each district. Justices of the peace are elected each alternate year. *Kansas Gen. Stat.* (1889), § 7065. As to qualifications of municipal officers, see *State v. Barnes* (Kan. 1893), 33 Pac. Rep. 621.

In *Kentucky*, each town annually elects five trustees, and they may fill vacancies in the board. *Kentucky Gen. Stat.* (1887), p. 1238. They also appoint a clerk, assessor, town-warden, collector and treasurer, p. 1239.

The judge of a town is an "officer," within *Kentucky Const.*, art. 6, § 6, as to the election of officers, etc. *Buckner v. Gordon*, 81 Ky. 665.

A charter requirement of a majority of the votes cast in order to elect an officer, *e. g.*, an engineer, was held not to preclude the council from adopting a regulation dropping, upon the fourth roll-call, the lowest candidate. *Morton v. Youngerman*, 89 Ky. 505.

In *Maine*, "Annual town meetings shall be held in March, and the voters shall then choose, by a major vote, a clerk, three, five, or seven inhabitants of the town to be selectmen and overseers of the poor, when other overseers are not chosen, three or more assessors, two or more fence-viewers, treasurer, surveyors of lumber, tythingmen, sealers of leather, measurers of wood and bark, constables, collectors of taxes, and other usual town officers; and if one-third of the voters present are in favor thereof, they shall choose, by major vote, one auditor of accounts, all of whom shall be sworn. Treasurers or collectors of towns having more than 1500 inhabitants shall not be selectmen or assessors." *Maine Rev. Stat.* (1883), p. 79, § 12.

A person not a citizen of the *United States* may be a selectman, and his official acts bind the town. *Justice's Opinion*, 70 Me. 560.

In *Cushing v. Frankfort*, 57 Me. 541, acts of *de facto* selectmen were held binding, although their election was invalid through a defect in the return of the warrant of the town meeting.

As to the requisites of evidence of a town officer's appointment and qualifications, see *Abbott v. Hermon*, 7 Me.

118; *Fossett v. Bearce*, 29 Me. 523; *Bennett v. Treat*, 41 Me. 226.

In *Massachusetts*, at the annual town meeting, are elected a town clerk, selectmen, assessors, overseers of the poor, treasurer, highway surveyors, "constables, who shall also be collectors of taxes unless other persons are specially chosen collectors," field drivers, fence-viewers, "and all other usual town officers." *Massachusetts Pub. Stat.* (1882), p. 235, § 78.

Under statutory authority to appoint a police officer to hold during the pleasure of the selectmen, their appointment of such officer, "to continue till the next annual town meeting," was held valid. *Com. v. Higgins*, 4 Gray (Mass.) 34.

The appointment of a town collector *pro tempore* merely by a writing signed with the names of all by one selectman, in the absence of the others, was held not to satisfy the statute requiring a writing "under their hands." *Phelon v. Granville*, 140 Mass. 386.

In *Michigan*, are chosen annually a supervisor, a township clerk, a treasurer, a school inspector, a commissioner of highways, and justices of the peace and constables, not exceeding four. *Michigan Gen. Stat.* (1882), § 677. Such commissioner may fill a vacancy in the office of overseer of highways, § 731. The township board may fill a vacancy in the office of treasurer, § 730, or of assessor or supervisor, § 825. The supervisor is, *virtute officii* assessor, § 733. He is also law agent of the township, § 737. The township clerk is the sealer of weights and measures, § 1557. The librarian of the township library is appointed by the board of school inspectors. *Michigan Gen. Stat.* (1890), § 5140.

A village charter, in making the president of a village *ex officio* a member of the county board of supervisors, does not contravene *Michigan Const.*, arts. 10 and 11; for the two positions are different, and he is not thereby made a supervisor. *Atty. Gen'l v. Preston*, 56 Mich. 177.

In *Minnesota*, are elected annually three town supervisors, a town clerk, a treasurer, an assessor, and, for each road district, an overseer of highways. Justices and constables are elected biennially. *Minnesota Gen. Stat.* (1891), §§ 1126, 1132. The justices of the peace may fill vacancies, § 1128. On failure in the office of town assessor, the county auditor may appoint, § 1130.

The filling of a vacancy in a town

office, although by a majority of the board of justices and supervisors, is invalid, unless each member had notice of the meeting. *State v. Guiney*, 26 Minn. 313.

In *Mississippi*, "The officers of every municipality shall be a mayor, aldermen, a marshal, a tax collector, a treasurer, a clerk, and a street commissioner." In a town, there are five aldermen. The marshal is the tax collector, and he may be the street commissioner. The officers, other than the mayor, aldermen and marshal, are elected by the mayor and aldermen, § 2798.

In *Missouri*, are biennially elected one trustee, *ex officio* treasurer, one collector, one clerk, *ex officio* assessor, one constable, two members of the board of directors, two justices of the peace, and as many road overseers as there are districts in the township. *Missouri Rev. Stat.* (1889), § 8441.

In *Nebraska*, a town clerk, treasurer, three judges, and two clerks of election, an assessor, and an overseer of highways for each road district, are elected annually, and, with slight exception, two justices of the peace and two constables biennially. The township supervisor is elected "each odd numbered year in the odd numbered townships, and each even numbered year in the even numbered townships." *Nebraska Consol. Stat.* (1891), § 1588. As to the duty of the county clerk to fill vacancies, see *State v. Forney*, 21 Neb. 223.

Upon a vacancy in the office of township supervisor, not filled by appointment as prescribed in *Nebraska Comp. Stat.*, ch. 26, § 103, it may be filled by election at a special town meeting properly convened. *State v. Taylor*, 26 Neb. 580.

In *New Hampshire*, there are annually elected a town clerk, selectmen, assessors, treasurer, auditor, collector, agent, overseer of the poor, health officer, constables, highway surveyors, fence-viewers, lumber surveyors, measurers of wood and bark, fireward, pound-keeper, etc. *New Hampshire Pub. Stat.* (1891), ch. 43, § 25.

A collector's acceptance of the office of selectman, is not such recognition of that of collector as relieves him of the disability of incompatible offices within *New Hampshire Pub. Stat.* (1891), p. 155, § 34. *Atty. Gen'l v. Marston* (N. H. 1892), 22 Atl. Rep. 560.

In *New Jersey*, there are elected at the annual township meeting, a clerk, assessors, collectors, "three or more

judicious freeholders of good character to hear and finally determine all appeals relative to unjust cases of taxation, two freeholders commonly called chosen freeholders," highway surveyors, overseers of the poor, constables, highway overseers, and pound-keepers; also "five judicious freeholders," as a township committee to audit accounts of the township officers, superintend expenditures, etc. *New Jersey Revision* (1877), p. 1195, § 12.

In *New Mexico*, the board of trustees ("*fidei comisarios*") "provide by ordinance for the election of a treasurer and such subordinate officers as they may deem necessary for the good government of the corporation," prescribe their duties, and fix their compensation. *New Mexico Comp. L.* (1884), 1689.

In *New York*, at the annual town meeting, there are chosen a supervisor, town clerk, assessor, collector, overseers of the poor, commissioners of highways, and not more than five constables. *Bird. New York Rev. Stat.* (1890), p. 3077, § 17. A school commissioner cannot act as town clerk, p. 542, § 26. Nor can an excise commissioner, p. 1058, § 52. The supervisors and two justices may appoint special constables to serve three days or less. *New York Sess. Laws* (1892), p. 510.

As to the election of town officers, see *New York Laws* (1892), ch. 569, § 12 *et seq.* (Am. G. L., ch. 20). As to their qualification, § 50 *et seq.*

The *New York Act* of 1892, ch. 401, §§ 2 and 3, is construed as to the election of excise commissioners in *People v. Lahr*, 71 Hun (N. Y.) 271.

In the absence of contrary statutory provision, the general law will control the time of election of village officers, if no special law provides therefor. *State v. Cornwall*, 35 Minn. 176.

In *North Carolina*, the town commissioners annually elect a constable and "such other officers and agents as are necessary to enforce their by-laws, keep their records, and conduct their affairs." *North Carolina Code* (1883), § 3800. Also quadrennially, to serve as assessors, "one justice of the peace and two discreet freeholders." *Sess. Laws* (1885), p. 296.

As to when a duly elected town officer is not indictable for refusing to accept the office, see *State v. McEntyre*, 3 Ired. (N. Car.) 171.

As to when the court will allow amendment, or take judicial notice of what persons were designated as trus-

2. Powers and Duties.—The powers of municipal officers in general have already been considered.¹ In some states, the duties of the town clerk and of the treasurer are left to be prescribed by the governing board; in others, the duties of these and other town officers depend on the statutory town system of the given state.²

tees or directors in laying off lots, see *Hertford v. Winslow*, 71 N. Car. 150.

In *Ohio*, on failure of the electors to appoint a treasurer and trustees, the county auditor may appoint the same. *Ohio Rev. Stat.* (1890), § 1371.

In *Pennsylvania*, are annually elected a township assessor, supervisors, treasurer, auditors, and clerk. *Bright. Purd. Pennsylvania Dig. L.* (1885), p. 1637. Also constables annually, p. 315. The court of quarter sessions may fill vacancies, p. 1638, § 4. Overseers of the poor are elected biennially, § 12. The collector is appointed by the supervisors and overseers, p. 1593, § 74.

The requirement (*Pennsylvania Laws* (1862), p. 142), that the voters of Hempfield township "elect six supervisors of roads, and each district be entitled to have one elected therein," means that each has its supervisor elected by the whole township. *In re Martz*, 110 Pa. St. 502.

In *Rhode Island*, there are elected annually a town clerk, council, treasurer, sergeant, assessors, a collector, pound-keeper, constables, overseer of the poor, and fence-viewers; also highway surveyors and justices of the peace. Certain special officers may be elected at the meeting, if required, or in some instances by the council, *e. g.*, auctioneer, superintendent of chimneys, woodcorder, sealer, etc. *Rhode Island Pub. Stat.* (1882), p. 109.

Where a town ordinance required the election of as many highway surveyors as there were districts, and the town elected a single surveyor for three districts, the council's assignment of him to one of them and appointment of other surveyors for the two other districts, was held to be *ultra vires* and void. *State v. Gorman*, 13 R. I. 318.

As to the legal effect of custom and general acquiescence, upon the election of town officers, see *State v. Andrews*, 15 R. I. 394; *State v. Briggs*, 15 R. I. 425.

In *South Carolina*, if the town corporators fail to appoint the road officers required by the act of incorporation, the county commissioners appoint them. *South Carolina Gen. Stat.* (1882), § 1076.

In *Tennessee*, the aldermen of any municipality annually elect a recorder, a treasurer, and a constable. *Tennessee Code* (1884), § 1638. The validity of an officer's election may be inquired into collaterally. *Lawrence v. Ingersoll*, 88 Tenn. 52.

In *Vermont*, "Women twenty-one years of age may be elected or appointed to the office of town superintendent of schools or town clerk of a town, if they have resided in such town one year not preceding such election." *Vermont Rev. Laws* (1880), § 2659.

A village charter's requirement that a clerk and trustees be elected by ballot, was held not to be complied with by appointing a nominating committee and accepting its report. *State v. Harris*, 52 Vt. 216.

Where the charter of a village requires its trustees to be elected annually on a certain day, and a majority then wrongfully adjourn without day, the minority can lawfully reorganize the meeting and their election of trustees will be valid. *Stone v. Small*, 54 Vt. 498.

In *Virginia*, each town elects annually a mayor and six councilmen. *Virginia Code* (1887), § 1027. The council appoints the collector, § 1038.

In *Washington*, the town clerk is *ex officio* assessor, and the marshal is *ex officio* tax and license collector. The police justice is appointed by the council. *Washington Gen. Stat.* (1891), § 662.

In *Wyoming*, the council, elected annually, appoints a marshal, who is *ex officio* fire warden and street commissioner, a clerk, who is *ex officio* assessor, and a treasurer. All officers must be qualified electors and residents of the town, and no person is eligible who is a defaulter thereto. *Wyoming Sess. Laws* (1888), ch. 43.

1. See PUBLIC OFFICERS, vol. 19, p. 552. See also, *supra*, this title, *Governing Bodies*; also *Powers and Privileges*.

2. In *Alabama*, thereon, see *Alabama Code* (1886), § 1500, pl. 8. The intend-ant has the jurisdiction of a justice of the peace, § 1501. The marshal may arrest, without a warrant, persons

breaking the peace or violating any of the town ordinances, § 1502.

As to powers of municipal officers, see *Fox v. McDonald* (Ala. 1893), 13 So. Rep. 416.

In *Arizona*, each of the three town trustees must give bond in \$5,000 for the faithful performance of his duties. *Arizona Rev. Stat.* (1887), § 154.

In *Arkansas*, the mayor has all the powers of a justice of the peace, and must keep a docket, etc. The marshal is the principal ministerial officer of the town, and has the power of a sheriff, with jurisdiction co-extensive with the county. *Arkansas Dig. Stat.* (1884) 796.

Under a statute giving a town mayor the general powers of a justice of the peace, he may take an affidavit for appeal. *Robinson v. Benton County*, 49 Ark. 49.

In *California*, as to the respective duties of the district road overseers and the county board, as to streets and highways, see *California Pol. Code* (1885), §§ 2618, 2643-5. As to those of township assessors, see § 4109, note. As to those officers of the six classes of municipal corporations respectively, see *California Act of 1883*; *California Pol. Code App.*, p. 737 *et seq.*

In *Colorado*, the mayor presides at all meetings of the town trustees, but has no vote, save upon a tie. *Colorado Annot. Stat.* (1891), § 4511.

In *Connecticut*, the town officers, other than the board of selectmen already mentioned, are assessors, boards of relief, sealers of weights and measures, hay-wards, pound-keepers, public weighers, and measurers of wood. *Connecticut Gen. Stat.* (1888), § 117 *et seq.*

The duty of the town committee of encroachments in removing a nuisance from a highway, is judicial, and cannot be lawfully performed by a single member acting without the others' notification or convening. *Martin v. Lemon*, 26 Conn. 192, citing *Damon v. Granby*, 2 Pick. (Mass.) 345.

As to the powers and duties of the board of selectmen in *Connecticut*, see *supra*, this title, *Governing Bodies*.

In the *Dakotas*, as to the duties of the township clerk, see *Dakota Comp. L.* (1887), § 777; of the treasurer, § 783.

In *Florida*, as to the duties of the mayor and of the collector of the town, see *Florida Dig. L.* (1881), p. 252.

In *Georgia*, the mayor is the chief executive officer of the town. *Georgia*

Code (1882), § 792. The marshal is tax collector, § 790.

In *Illinois*, the town supervisor, town clerk, and justices of the peace, constitute a board of auditors to examine the accounts of the supervisor, overseer of the poor, and commissioner of highways; also to certify to the county clerk the amount of demands, etc., for purposes of taxation. *Illinois Rev. Stat.* (1891), p. 1507, § 118, *et seq.* The supervisor, the assessor, and the clerk constitute a board of health, p. 1509.

A town supervisor may employ an attorney in behalf of the town. *Bruce v. Dickey*, 116 Ill. 527.

In *Indiana*, the town marshal has the ordinary duties of a constable. *Indiana Rev. Stat.* (1888), §§ 3326, 7326. Also those of road supervisor, § 5090. The township trustee is *ex officio* inspector of elections, overseer of the poor and fence-viewer, § 5994. The town clerk must attend all the meetings of the trustees. *Byer v. Newcastle*, 124 Ind. 86. The trustees' power under § 448 to sell bonds for school buildings may be exercised through a broker. *Reed v. Orleans*, 1 Ind. App. 25. Further, as to the power of the board to issue and sell the bonds, see *Williams v. Albion*, 58 Ind. 329. As to the duty of a township trustee to make statements to the county board, see § 6001; *Murphy v. Oren*, 121 Ind. 59; *Bunnell v. White County*, 124 Ind. 2. As to his power to incur debt, see *State v. Hawes*, 112 Ind. 323; *Jefferson School Tp. v. Litton*, 116 Ind. 471. As to duties in election of county superintendent, under § 4424, see *State v. Dillon*, 125 Ind. 65. As to the trustees' powers in the case of joint-graded schools, see *Hanover School Tp. v. Gant*, 125 Ind. 557. As to their power to build and locate schoolhouses, see *Braden v. McNutt*, 114 Ind. 214.

The marshal may, without a warrant, arrest one within his view violating a town ordinance. *Scircle v. Neeves*, 47 Ind. 289.

Under *Indiana Stat.* of 1852, township trustees, in contracting for the building of a bridge, cannot bind the township to vote a tax. *Houston v. Clay County*, 18 Ind. 396. The right of *de facto* township trustees to exercise their office, cannot be questioned collaterally. *Redden v. Covington*, 29 Ind. 118. Further, as to the powers of township trustees in *Indiana*, see *Philips v. East*, 16 Ind. 254; *Fayette County v. Chitwood*, 8 Ind. 504.

An agreement by town trustees to

refund a license, if the act requiring payment be declared invalid, was held to be binding in *Columbia v. Authes*, 84 Ind. 31.

A township trustee cannot recover a sum paid for which he failed to receive credit through his negligent keeping of accounts of vouchers. *Butt v. Jennings School Tp.*, 81 Ind. 69.

Where A and B were the town trustees, a contract by A with B to sell to the town for a cemetery, land owned by A and C, was held to be voidable at the election of the vendee. It was immaterial that A vacated his seat, and declined to act pending the negotiation. *Pratt v. Luther*, 45 Ind. 250.

A contract describing the trustee of a civil township as acting for "the township," imports the civil township; he can incur no liability for the benefit of property of the school township. *Jackson Tp. v. Home Ins. Co.*, 54 Ind. 184.

Under *Indiana* Act of 1891, p. 286, § 236, the township trustee is the proper custodian of the dog fund. *Florer v. State*, 133 Ind. 453. A town trustee may employ a broker to sell bonds issued under *Indiana* Rev. Stat. (1881), § 4488. *Reed v. Orleans*, 1 Ind. App. 25.

In the absence of fraud or collusion, the determination of the town trustee as to the necessities of poor persons is conclusive; he may employ a physician, although the county board has employed another. *Perry County v. Lomax*, 5 Ind. App. 567. The fact that a sick non-resident has been received into a house from charitable motives, does not preclude the township trustee from acting under the statute as to relief of one without money or friends. *Howard County v. Jennings*, 104 Ind. 108. If a county physician refuses to treat an urgently needy person, the township trustee may employ another; and his declarations concerning payment are competent. *Washburn v. Shelby County*, 104 Ind. 321.

In *Iowa*, "a marshal shall be appointed by the trustees, and shall be the principal ministerial officer of the corporation, and shall have the same power that constables have by law, co-extensive with the county for offenses committed within the limits of the corporation." *McClain's Iowa Code* (1888), § 702.

Township trustees cannot borrow money for highway improvements, nor make such improvements in one district a charge upon another. *Cass County Bank v. Conrad*, 81 Iowa 482.

Township trustees, after purchasing land for a cemetery and finding it unfit therefor, may sell it with a restriction that it shall not be used for a private or public cemetery. *Bushnel v. Whitlock*, 77 Iowa 285.

Township trustees cannot lawfully buy highway tools on credit and in advance of a tax levy therefor. *Wells v. Grubb*, 58 Iowa 384; *Hanks v. North*, 58 Iowa 396.

A district township board of directors are bound to designate the proper fund out of which a judgment against the township is to be paid; also to direct the order to be drawn. *Coon v. Providence*, 52 Iowa 287.

A township board of health cannot delegate its power to employ a physician. *Young v. Blackhawk County*, 66 Iowa 460.

In *Kentucky*, trustees' entry on lots, held adversely, gives no title. *Young v. Kimberland*, 2 Litt. (Ky.) 223. To give title to succeeding trustees, there must be words of succession. *Falmouth v. Horter*, 4 Litt. (Ky.) 119. One offering a deed must show that it was by a majority of the trustees. *Owings v. Hies*, 3 T. B. Mon. (Ky.) 286.

Further, as to powers of town trustees, title, etc., see *Morrison v. McMillan*, 4 Litt. (Ky.) 210; 14 Am. Dec. 115; *Mason v. Mulholm*, 6 Dana (Ky.) 140; *Lee v. Flemingsburg*, 7 Dana (Ky.) 28; *Guffield v. Bowling Green*, 6 B. Mon. (Ky.) 224; *Wickliffe v. Bascom*, 7 B. Mon. (Ky.) 681.

In *Louisiana*, representative officers of a local jurisdiction invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness. *Police Jury v. Britton*, 15 Wall. (U. S.) 566. This decision overrules *Rogers v. Burlington*, 3 Wall. (U. S.) 654, and *Mitchell v. Burlington*, 4 Wall. (U. S.) 270; *Brenham v. German American Bank*, 144 U. S. 173, 549.

In *Louisiana*, as to when the police board has absolute and discretionary power, free from the control of the mayor, see *Fitzpatrick v. Gaster* (La. 1893), 14 So. Rep. 304.

In *Maine*, highway surveyors may repair sudden injuries, remove snow, and remove fences to prevent drifting;

also remove obstructions, and plant trees. *Maine* Rev. Stat. (1883), pp. 253, 254, 258. As to the duties of the treasurer as collector of taxes, see pp. 134, 138.

Only upon express authorization by vote, can the treasurer of a town convey real estate in its behalf; and a note given in payment of the void conveyance is void. *Monson v. Tripp*, 81 Me. 24.

In conveyance of land reserved for public uses, the town treasurer and the trustees thereof, must comply strictly with the statute; otherwise his conveyance cannot be ratified by their subsequent acts. *Argyle v. Dwinel*, 29 Me. 29.

The maxim, *salus populi suprema lex*, was applied to sustain the constitutionality of a statute empowering town officers to isolate an infected person. *Haverty v. Bass*, 66 Me. 71.

As to the powers and duties of selectmen in *Maine*, see *supra*, this title, *Governing Bodies*.

In *Massachusetts*, a town treasurer, under *Massachusetts* Stat. (1875), ch. 209, has no right, *virtute officii*, to give a new note of the town in renewal of an old note. *Abbott v. North Andover*, 145 Mass. 484. A committee chosen by a town to erect a building, is not a board, but an agent, and may act by agreement of its members separately. *Shea v. Milford*, 145 Mass. 528. An invalid executory agreement by the overseers of the poor, for services to the town, cannot, after change of membership of the board, be ratified by members acting individually. *Reed v. Lancaster*, 152 Mass. 500.

Authority in a town treasurer to borrow money on the credit of the town, cannot be established by proof of long practice of such borrowing and of subsequent votes of acceptance. *Benoit v. Conway*, 10 Allen (Mass.) 528. Compare *Dickinson v. Conway*, 12 Allen (Mass.) 487.

As to the power of a building committee to change specifications and bind the town for extra work beyond the appropriation based on their report, see *Shea v. Milford*, 145 Mass. 528.

A town clerk may amend a record made by him when in office under a former election. *Welles v. Battelle*, 11 Mass. 477. Otherwise, when he is no longer in office. *Hartwell v. Littleton*, 13 Pick. (Mass.) 229.

As to the duty of the town clerk, under *Massachusetts* Pub. Stat., ch. 100, § 13, in requiring the bonds of a license

to sell intoxicating liquor, see *Howes v. Maxwell*, 157 Mass. 333.

As to the powers and duties of the selectmen in *Massachusetts*, see *infra*, this title, *Governing Bodies*.

In *Michigan*, the jurisdiction of the township drain commissioner extends to drains that lie wholly within his township. *Michigan* Gen. Stat. (1890), §§ 1740a-7. But see *Tinsman v. Monroe County Judge*, 82 Mich. 562. As to the duties of the highway commissioner in laying out a road, return to the township clerk, etc., see *Cowing v. Ripley*, 76 Mich. 651. As to his duty in chancery proceedings under the statute for encroachments upon highways, see *Lebanon Tp. v. Burch*, 78 Mich. 641.

Town officers cannot, by acquiescence, transfer local duties from local officers to commissioners appointed by the governor. So held as to a township's street improvement under *Michigan* Act of 1871, No. 414. *Hubbard v. Springwells Tp.*, 25 Mich. 153.

A township clerk has no authority *ex officio* to sign the names of the highway commissioners to an order on the township treasurer. *Just v. Wise Tp.*, 42 Mich. 573.

A town clerk's entry is not conclusive evidence of a new town treasurer's receipt of money from his predecessor; an intentional acceptance must be shown. *Rice v. Sidney*, 44 Mich. 37; 38 Am. Rep. 227.

A contract through the board of health, was held to render the township primarily liable to a physician for his services in attending one confined by scarlet fever. *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63.

In *Minnesota*, the town supervisors are, *virtute officii*, fence-viewers. *Minnesota* Gen. Stat. (1891), § 1135. They also constitute a town board of audit, § 1140. As to the powers of town insurance companies, see § 3095.

As to the care of highways, the supervisors are mere agents of the town. *Woodruff v. Glendale*, 23 Minn. 537; 26 Minn. 78; *Hutchinson Tp. v. Filk*, 44 Minn. 536. *Mandamus* will not lie to compel them to make a particular improvement upon a town highway, unless the duty be plain and imperative. *State v. Somerset*, 44 Minn. 549.

In *Mississippi*, the mayor and aldermen appoint a fire marshal, who may be the mayor or town marshal, with power to keep from the vicinity of any fire all suspicious persons lurking near, and to compel bystanders to aid in ex-

tinguishing the fire or preserving property in danger therefrom, or preventing goods from being purloined. *Mississippi Code* (1892), § 2967. The sixteenth section in every township being reserved for the support of schools, "the board of supervisors shall annually appoint three trustees for each township in their respective counties, having school lands or funds, or which ought to have such lands or funds; and the trustees shall recommend to the boards of supervisors the lawful purposes for which the available school funds of their townships ought to be appropriated, and the same shall be appropriated accordingly," § 4153.

In *Missouri*, the board of directors audit all accounts of township officers for services as such, except the assessor; audit all other accounts legally presented to them against the township; levy all taxes for township road and bridge purposes; and estimate expenses, etc. *Missouri Rev. Stat.* (1889), § 8473 *et seq.*

In *Nebraska*, the town supervisor is *ex officio* overseer of the poor. He must attend the meetings of the county board of supervisors. *Nebraska Consol. Stat.* (1891), § 981. Thus he is *ex officio* a member of the county board. *State v. Taylor*, 26 Neb. 580.

In *New Hampshire*, as to the duties of the town clerk, treasurer, auditor, collector, constables, agent, overseer of the poor, etc., see *New Hampshire Stat.* (1891), ch. 43. As to the powers and duties of the board of selectmen in *New Hampshire*, see *supra*, this title, *Governing Bodies*.

An ex-town clerk may be allowed to amend a record made by him when clerk. *Gibson v. Bailey*, 9 N. H. 168.

In *New Jersey*, as to the duties and jurisdiction of the township boards of chosen freholders in opening by-roads, see *Perrine v. Farr*, 22 N. J. L. 356; *Stevens v. Allen*, 29 N. J. L. 68, 509.

Under *New Jersey Laws* (1888), p. 366, the township committee may contract with a water company for a supply of water, and levy a tax to pay therefor; and this, though the supply is not to be carried to every part of the township. *State v. Summit Tp.*, 52 N. J. L. 483.

A borrowing or an expending for purposes of the township, by members of its committee, will render it liable, unless ratified at a regular meeting. *Musgrove v. Kennell*, 23 N. J. Eq. 75.

In *New Jersey*, a township committee is the proper body to issue bonds

authorized by a statute, although having no general authority to act. *Midleton v. Mullica Tp.*, 112 U. S. 433.

Further, as to the power of municipal officers, see *McDonald v. Newark* (N. J. 1893), 26 Atl. Rep. 82.

In *New Mexico*, the town marshal is the principal ministerial officer, and has, coextensive with the county, the power that constables have by law. *New Mexico Comp. Laws* (1884), § 1690.

In *New York*, as to the duties of town officers, see *New York Laws* (1892), ch. 569, §§ 80, 83, 104.

The joint action of a majority of the qualified members of any town or county board is sufficient. *Bird. New York Rev. Stat.*, p. 27, § 87. This was the rule at common law. As to its application to an act of one of two overseers of the poor, see *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223.

The successor of a deceased overseer of the poor has control of a suit begun by him, without being substituted as plaintiff. *Bellinger v. Birge*, 54 Hun (N. Y.) 511.

An action may be brought by a supervisor as such, to recover a balance in his predecessor's hands, certified by the town auditors, but not paid to plaintiff on demand. *Gleason v. Youmans*, 9 Abb. N. Cas. (N. Y.) 107. As to the proper party to sue or be sued, see the case of an overseer of the poor, *People v. Board of Auditors*, 74 N. Y. 310; 10 Hun (N. Y.) 551; of commissioners of highways, *Galen v. Clyde*, etc., *Plank Road Co.*, 27 Barb. (N. Y.) 543; of supervisors, *Gailor v. Herrick*, 42 Barb. (N. Y.) 79. Where there is no town treasurer, the town supervisor is the "chief fiscal officer" to whom to present claims for interest on town bonds, within *New York Code Civ. Proc.*, § 3245. *Stanton v. Taylor*, 19 N. Y. Supp. 43; 64 Hun (N. Y.) 633. *Compare Gage v. Hornellsville*, 106 N. Y. 667.

A town supervisor can maintain an action against officials that by fraud have involved the town in debt; *e. g.*, railroad commissioners who have fraudulently issued town bonds. *Mitchell v. Strough*, 35 Hun (N. Y.) 83.

A resolve of a town meeting, directing the town supervisor "as supervisor" to bring an action to restrain commissioners from disposing of town bonds, was held not to authorize a suit in the name of the town. *Lyons v. Cole*, 3 Thomp & C. (N. Y.) 435.

As to the power of town supervisors to borrow money for road and bridge

purposes, see *People v. Tompkins*, 64 N. Y. 53.

A town supervisor, directed to pay interest on town bonds, and receiving from the county treasurer the money therefor, acts as the town agent and cannot question the authority of his principal; he has no discretion upon the question of their legality. *Ross v. Curtiss*, 31 N. Y. 606.

A town supervisor's authority under statute must be pursued strictly. So held as to one's agreement under *New York Laws* (1865), ch. 41, to pay a recruiting agent. *Powers v. Shephard*, 49 Barb. (N. Y.) 418.

The jurisdiction of town supervisors to audit accounts against the town, being concurrent with that of the auditors, they cannot allow accounts, after they have been rejected by the latter on their merits, though they may allow claims presented in proper form which have been rejected by the auditors because not itemized. *McCrea v. Chahoon*, 54 Hun (N. Y.) 577.

Town auditors cannot allow a claim rejected by the prior board. *Osterhoudt v. Rigney*, 98 N. Y. 222; *Osterhoudt v. Hyland*, 27 Hun (N. Y.) 167.

Town auditors must pass upon each item separately; they cannot, without modifying any item, deduct from the amount of the claim a gross sum. *People v. Board of Auditors*, 20 Hun (N. Y.) 150.

Village trustees may authorize the erection of a soldiers' monument in a public street without consent of the owner of the fee. *Tompkins v. Hodgson*, 4 Thomp. & C. (N. Y.) 435.

Charter provision that village trustees "have the sole control and management of the streets," was held to import the duty to keep the sidewalks in repair. *Koch v. Edgewater*, 18 Hun (N. Y.) 407.

A village board, under its power to make a contract, can insert therein a provision that a certain sum shall be deemed liquidated damages. And, under such provision, such damages can be recovered in the party's suit for work and materials, although furnished under a resolution adjudged invalid. *Parr v. Greenbush*, 42 Hun (N. Y.) 232.

As to the authority of village trustees to employ counsel, and the attorney's power to bind in getting commissioners appointed to appraise upon a change of street grade, see *Collins v. Saratoga Springs*, 70 Hun (N. Y.) 583.

In *North Carolina*, the mayor of a

town has the jurisdiction of a justice of the peace. *North Carolina Code* (1883), § 3818.

Without the sanction of the county commissioners, township trustees cannot make a valid contract to build a bridge. *Paine v. Caldwell*, 65 N. Car. 488. The discretionary power of town commissioners to acquire and dispose of public buildings "for the use" of the town, was held conclusive. *Schaver v. Salisbury*, 68 N. Car. 291.

Town commissioners are held to be empowered to bring ejectment to recover land granted by the legislature for town commissioners. *Bath v. Boyd*, 1 Ired. (N. Car.) 194.

In *Ohio*, the trustees of an original surveyed township are a body corporate with power to contract, sue and be sued, and manage the ministerial and school land sections. *Ohio Rev. Stat.* (1890), §§ 1368, 1404. If a statute provides for assessors and highway supervisors over a city which forms part of a township, the like officers of the township have no authority within the city. *State v. Ward*, 17 Ohio St. 543.

Under authority to provide a town hall, township trustees need not acquire an entire building or the ground. *New London Tp. v. Miner*, 26 Ohio St. 452.

In *Pennsylvania*, a township supervisor may maintain a bill in equity to enjoin a public nuisance on a highway. *Nelson v. Ehret*, 4 Kulp (Pa.) 337.

A burgess cannot, without express authority, impose fines for violation of borough ordinances. *Com. v. Thompson*, 110 Pa. St. 297.

Under a charter giving the mayor of a town the powers of a justice of the peace, he may issue an attachment returnable before himself, and it may be served by a constable as well as by the town marshal. *Bain v. Mitchell*, 82 Ala. 304.

The duties of township auditors are purely statutory; the supervisor cannot impose on them the countersigning of township obligations. *Com. v. Upper Darby Auditors*, 2 Pa. Dist. Ct. Rep. 89.

Acts of municipal officers, under a statute, are not invalidated by its being declared void. *King v. Philadelphia Co.*, 154 Pa. St. 160.

As to the proper authorization of the solicitor to bring suit in behalf of the municipality, see *Lebanon v. Lebanon, etc.*, St. R. Co., 1 Pa. Dist. Ct. Rep. 563. Further, as to the powers of municipal

3. Liabilities—*a.* TO PERSONS.—Town officers properly exercising lawful discretion within the scope of their employment, are not liable to persons for injury or damages incurred in consequence of their official acts.¹

officers, see *Com. v. Crogan*, 155 Pa. St. 448.

In *Rhode Island*, as to the powers of town councils, etc., see *supra*, this title, *Governing Bodies*.

In *Tennessee*, the recorder of a municipality has the powers of a justice of the peace, in all cases of violation of the criminal laws or of the ordinances. *Tennessee Code* (1884), § 1614.

In *Texas*, the marshal has the powers of a constable, as well as those prescribed by the ordinances. *Texas Rev. Civ. Stat.* (1889), art. 534.

Within the *Vermont* statutory requirement as to the town clerk's duties, a suitable index is such a one as will enable a man understanding the plan on which it is made up, and having ordinarily fair business capacity, to find the record he is in search of. *Smith v. Royalton*, 53 Vt. 604.

The fact that commissioners appointed by the town to subscribe railroad stock, incorporated into the contract conditions beyond the statutory instrument of assent, and that it was not repudiated by the town, was held not to render them agents of any other party than the town. *Danville v. Montpelier, etc., R. Co.*, 43 Vt. 144.

The town agent to prosecute and defend suits has no general authority to settle them. He is personally liable to a party acting on the faith of a promise made by him in such compromise. *Clay v. Wright*, 44 Vt. 538.

As to the powers and duties of the board of selectmen in *Vermont*, see *supra*, this title, *Governing Bodies*.

In *Virginia*, the sergeant has the power of a constable within the corporate limits and one mile beyond them. *Virginia Code* (1887), § 1034. "The mayor, as chief magistrate of the town, shall take care that the by-laws and ordinances are faithfully executed. He and the other members of the council shall each be clothed with all the powers and authority of a justice in civil matters within the corporate limits of the town, and in criminal matters, within said limits and one mile beyond the same." *Virginia Code* (1887), § 1033. Councilmen are inhibited from having any contract with or claim against the town; if any, it is void, and if such

claim has been paid, the money is recoverable back with interest. §§ 823, 1036. Acts of councilmen of a new town, appointed by the legislature to serve until their successors are elected, were held to be binding, although one of them participated therein after moving beyond the corporate limits. *Roche v. Jones*, 87 Va. 484.

In *Wisconsin*, the town supervisors belonging to the two most numerous political parties, are inspectors of election. *Wisconsin Sess. Laws* (1891), p. 654. The town clerk is the sealer of weights, measures, scales and beams. *Wisconsin Annot. Stat.* (1889), § 1662.

The duty of immediate diligence justifies town officers in repairing on Sunday a highway defect, if occurring on Saturday and very dangerous; otherwise not. *Alexander v. Oshkosh*, 33 Wis. 277.

As to the power of village trustees as health officers, to contract for the erection of a crematory for the consumption of garbage, and the effect of a patent thereon under the statutory requirement of competition of bidders, see *Kilvington v. Superior*, 83 Wis. 222.

1. See *PUBLIC OFFICERS*, vol. 19, p. 490; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Highway Com'rs v. Ely*, 54 Mich. 173.

In *Arkansas*, town officers are not liable to persons injured by the passage of an illegal ordinance. *Trammell v. Russellville*, 34 Ark. 105.

In *Connecticut*, a town clerk receiving a deed for record and entering upon it "received for record," but suffering it to go out of his hands unrecorded, is liable to any person prejudiced thereby. *Welles v. Hutchinson*, 2 Root (Conn.) 85.

Selectmen are liable to one over whom they unjustly appoint an overseer. *Johnson v. Stanley*, 1 Root (Conn.) 245; *Waters v. Waterman*, 2 Root (Conn.) 214.

A landowner may maintain an action against a selectman under whose direction to cut away sufficient brush to make a highway passable, a laborer has cut down trees unnecessarily. *Ely v. Parsons*, 55 Conn. 83.

In *Iowa*, the rule that, in absence of fraud or malice, a judicial officer is not

liable for an erroneous application of the law, has been applied to the *quasi* judicial act of township trustees in refusing to issue to a railway company a certificate of compliance with the conditions upon which an aid tax was voted. *Muscatine West R. Co. v. Horton*, 38 Iowa 33.

Township trustees are held not to be liable to the payee of an *ultra vires* order. *Willett v. Young*, 82 Iowa 292.

Township trustees who had exceeded their authority in purchasing a road grader, were held not to be personally liable upon an order to the clerk signed by them to pay therefor. *Willett v. Young*, 82 Iowa 293.

In *Maine*, selectmen repairing a bridge have been held not to be liable for a trespass by a teamster employed by the town therein. *Bachelor v. Pinkham*, 68 Me. 253.

A statute making a town liable for all illegal doings and defaults of a pound-keeper, does not necessarily exempt him from being also liable. *Rounds v. Mansfield*, 38 Me. 586.

The chairman of a board of selectmen, to whom M., another member, had, for a legitimate purpose, delivered a town order signed by M. in blank, issued it to F., who loaned him money thereon, relying on his sole assurance of the town's need and authorization of the board to borrow. In F.'s action against M. for a false warranty, it was held that M., not knowing of such disposition and false representations, was not liable. *Fuller v. Mower*, 81 Me. 380.

In *Massachusetts*, an abutter was held not to be entitled to recover of an officer acting in the scope of his authority under a town vote involving change of grade of a highway. *Proctor v. Stone*, 158 Mass. 564.

Three men were held individually liable upon their offer of a reward for the arrest and conviction of a murderer; notwithstanding the official designation after their names, "selectmen," etc. The addition did not make their collective signatures mean the town and nothing else. *Brown v. Bradlee*, 156 Mass. 28.

Selectmen were held liable for a personal injury from failure to provide proper support for the sides of a public sewer. *Breen v. Field*, 157 Mass. 277.

A town committee has been held not to be personally liable for inadvertently pointing out to a road contractor an erroneous location of his section. *Nickerson v. Dyer*, 105 Mass. 320.

In *Michigan*, township supervisors cannot be held liable for an error in the honest exercise of their discretion. *Wall v. Trumbull*, 16 Mich. 228.

A *bona fide* contract by village trustees for building bridge abutments, was held not to bind them personally for payment. *Lyon v. Irish*, 58 Mich. 518.

In *New Hampshire*, although the statute was unconstitutional, and the vote illegal under which an assessment was made, the selectmen, if acting in good faith, are not liable to a taxpayer. *Ede v. Boardman*, 58 N. H. 580.

A suit cannot be maintained against the selectmen by a pauper to recover an excessive sum, in good faith named by them, and received back from him, to enable him to vote. Nor can the town's right to retain it be tried in such suit. *Brown v. Marden*, 61 N. H. 15.

In *New York*, a ministerial officer charged with an absolute and certain duty—*e. g.*, a town supervisor to lay before the board of commissioners a reassessment of damages from laying out a highway—is liable to a person having a special interest therein, for refusal to perform; and this, though he did so through an honest belief that the statute was unconstitutional. *Clark v. Miller*, 54 N. Y. 528. Compare *Olmsted v. Dennis*, 77 N. Y. 378; *New York* cases stated *supra*, this title, *Duties and Liabilities—In General*.

Village trustees are not liable to a property owner for failure of a public work—*e. g.*, a sewer—to benefit him as anticipated. *Garratt v. Canandaigua*, 135 N. Y. 437.

Town officers were held liable to a bond-holder for their non-payment of interest as required by statute; the money having been collected and in their hands. *Murdoch v. Aikin*, 29 Barb. (N. Y.) 59.

An act of village trustees injuring the value of property—*e. g.*, altering the grade of a street—will be enjoined. *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262.

A village was held liable for an injury from the unskillful building of a bridge by its trustees, acting as highway commissioners. *Conrad v. Ithaca*, 16 N. Y. 158.

Mandamus lies to compel town officers to perform a statutory duty—*e. g.*, the issuance of a bounty certificate to a volunteer. *People v. Martin*, 58 Barb. (N. Y.) 286.

b. TO THE TOWN.—In certain states, some officers are required to give bond for faithful performance of duty.¹ Official responsibilities in any given state depend upon its statutory system of town government.²

A town highway commissioner was held not to be bound to keep in repair a bridge within the limits of an Indian reservation, within the town, and not to be liable to damages from a defect thereof, though he had funds sufficient to make the repairs. *Bishop v. Barton*, 2 Hun (N. Y.) 436.

Town highway commissioners, to exonerate themselves from liability for a personal injury from a defect, must show not only that they had not sufficient funds, but also had properly applied therefor. *Warren v. Clement*, 24 Hun (N. Y.) 472.

A taxpayer, on being refused protection by the village officers, from a threatened injury—*e. g.*, an obstruction by a railroad company proceeding to erect a permanent structure—may bring suit and make the officers co-defendants with the trespasser. *Overton v. Olean*, 37 Hun (N. Y.) 47.

In *Pennsylvania*, the rule of non-liability of municipal officers for acts done in the honest exercise of their discretion, has been applied to the case of building by the supervisors of adjoining townships, of a causeway (instead of a bridge) across the boundary stream, to the damage of a mill-owner. *Yealy v. Pink*, 43 Pa. St. 212.

In *Tennessee*, neither against a town nor, *a fortiori*, against its mayor and aldermen, will an action lie for permitting a regularly licensed liquor-seller to so manage his business that an adjoining residence is annoyed by violent, obscene and disorderly conduct of the frequenters of the licensee's saloon or grocery. *McCrowell v. Bristol*, 5 Lea (Tenn.) 685, *citing* Dill. on Mun. Corp., §§ 308, 754, 773.

In *Vermont*, town trustees were held not to be liable to a person injured by the frightening of his horse, at a stone crusher operated in a highway in course of their official duties. *Bates v. Horner*, 65 Vt. 471.

Selectmen were held not personally liable on enlistment contracts, merely for having transcended their authority in offering soldiers bounties. *Leet v. Shedd*, 42 Vt. 277.

Under the *Vermont* statute (*Vermont Rev. L.*, § 2671), making the office of selectman compulsory, and a refusal to

serve, penal, their duties are *quasi* judicial, and they are not personally liable for an injury sustained through a defect in a highway. *Daniels v. Hathaway*, 65 Vt. 247.

As to the requisites of recovery in an action against a town clerk for failure to keep a suitable index, see *Hunter v. West Windsor*, 24 Vt. 327; *Lyman v. Edgerton*, 29 Vt. 305; *Smith v. Royalton*, 53 Vt. 604.

In *Wisconsin*, town officers refraining from needless injury, are not liable for errors of judgment in locating or constructing a ditch. *Smith v. Gould*, 61 Wis. 31. But as to compensation to a riparian proprietor for a "taking," by the cutting away of his land, compare *Smith v. Gould*, 59 Wis. 631.

1. *E. g.*, *California* Pol. Code (1885), § 950.

2. See PUBLIC OFFICERS, vol. 19, p. 562a.

In *Connecticut*, one employed by the selectmen under direct authority from the town to assist them in disbursements to paupers, is an "agent" of the town, within *Connecticut* Gen. Stat., § 1583, punishing misappropriations, false entries, or procurement of fraudulent claims. *State v. Clerkin*, 58 Conn. 98.

In *Florida*, a taxpayer may sue to enjoin the mayor of a town against misappropriating the corporate funds. *Peck v. Spencer*, 26 Fla. 23.

In *Georgia*, any municipal officer misappropriating funds from their specific object "shall be guilty of malpractice in office." *Georgia* Code (1872), § 1672, c.

In *Illinois*, a town's remedy on the official bond does not exclude its direct suit against the treasurer of the commissioners of highways to recover money which he refuses to pay over to his successor. *Blanchard v. La Salle*, 99 Ill. 278.

Sureties of a re-elected town supervisor, are held liable for town funds in his hands at the end of his preceding term. *Morley v. Metamora*, 78 Ill. 394; 20 Am. Rep. 266.

As to the requisites of indictment of a town officer for withholding the records from the county clerk, on discontinuance of the township system, see *Baysinger v. People*, 115 Ill. 419.

In *Indiana*, if a township trustee pays money after the specific fund is exhausted, he is entitled to be reimbursed, and is liable for no more than nominal damages; and this, though indebted to some of the funds, provided that on settlement of all accounts, he is a *bona fide* creditor of the township. *Constructing Indiana* Rev. Stat. (1888), §§ 5999, 6001, *Murphy v. Oren*, 121 Ind. 59. In an action on his bond, he must set off against the shortage in one fund, overpayments on account of another, so far as the shortage was occasioned thereby. *State v. Pinney*, 125 Ind. 427; *Pinney v. State*, 126 Ind. 577. In case of a deficit of school money, he can hold the town for advances made to school teachers from his own money. *Kiefer v. Troy County School Tp.*, 102 Ind. 279. As to the requisites for recovery, under § 6008, b, from the trustee for school supplies, see *State v. Hawes*, 112 Ind. 323; *Jefferson School Tp. v. Litton*, 116 Ind. 467. If he loans the money and takes a note payable to himself, the township cannot sue thereon. *Rowley v. Fair*, 104 Ind. 189.

In *Indiana*, a township trustee must account for money officially received, though lost without his fault; *e. g.*, stolen from the safe. *Morbeck v. State*, 28 Ind. 86. The legal title to the money is in himself; he is not a mere bailee. *Rock v. Stinger*, 36 Ind. 346, *citing* the case of a town collector in *Massachusetts*, *Colerain v. Bell*, 9 Met. (Mass.) 499. So, also, where he deposits in a solvent bank that becomes insolvent. *Inglis v. State*, 61 Ind. 212. The funds cannot be followed in the hands of third parties, as in the case of ordinary trustees. *Linville v. Leininger*, 72 Ind. 491. His liability to the township is exactly that of a banker for money deposited on general account. *Bocard v. Stevens*, 79 Ind. 270. He is liable until actual payment of the money to his successor, notwithstanding a receipt given therefor. *Madison Tp. v. Dunkle*, 114 Ind. 262.

A town trustee's assignment of his claim for services and failure to pay it, was held to be no breach of his official bond. *State v. Kiefer*, 120 Ind. 113.

A township trustee is held not to be liable on his bond for the defective construction of a bridge, where, by the action of the county commissioners, he has reimbursed the road fund therefor. *State v. Vogel*, 117 Ind. 188.

A township trustee is liable for a conversion if he applies money belong-

ing to one fund to pay a claim against another fund. *Robinson v. State*, 60 Ind. 26.

Where a township trustee, having in good faith made a contract rendering him officially liable to pay certain amounts, paid them in goods, or by giving credit on his store account with consent of parties, it was held that his retaining a corresponding amount of the township funds was not a conversion, and did not render him liable on his official bond. *State v. Parker*, 33 Ind. 285.

A township may maintain against its former trustee an action to recover the excess for which his successor had erroneously receipted to him. *State v. Haynes*, 79 Ind. 294.

The sureties of a township trustee are liable for his delinquencies occurring while he was holding over until his successor be qualified. *State v. Berg*, 50 Ind. 496.

As to the requisites of procedure in an action on the bond of a township trustee, see *Hawthorn v. State*, 48 Ind. 464.

The use of town funds by a treasurer, was held not to be a breach of his bond; but only a failure to account. *Harvey v. State*, 94 Ind. 159.

In *Iowa*, a road supervisor was held liable on his official bond for having expended for bridge materials a fund set apart by the township trustees for another purpose. *Wells v. Stomback*, 59 Iowa 376.

In *Kansas*, a township was held not estopped by its knowledge that its treasurer kept its funds in a certain bank which afterwards suspended. *Rose v. Douglass Tp.* (Kan. 1893), 34 Pac. Rep. 1046.

As to the duty of an outgoing township treasurer to pay funds over to his successor, and the statutory limitation of recovery, see *El Dorado Tp. v. Gordon*, 50 Kan. 307.

In *Maine*, town officers are not liable for failure to erect guide-posts, if the town has not raised any money therefor. *Studley v. Geyer*, 72 Me. 286.

The fact that a town treasurer's failure to pay orders was owing to the destruction of his house and town funds therein, by fire, was held not to exonerate him from liability on his official bond. *Monticello v. Lowell*, 70 Me. 437.

An inadvertently erroneous certificate by the selectmen that a defaulting town treasurer's accounts are correct, will not release his sureties, though

known to them, while he has enough assets to cover the deficit, and though he afterwards dies insolvent. *Farmington v. Stanley*, 60 Me. 472.

As to the tax collector's duty in appropriation between the annual assessment and liability upon his town bond, see *Orne v. Pearson*, 61 Me. 552; *Porter v. Stanley*, 47 Me. 515; 74 Am. Dec. 501.

In *Massachusetts*, a town treasurer is not liable, and a collector is not accountable to the town for taxes illegally assessed and not by him received. *Adams v. Farnsworth*, 15 Gray (Mass.) 423.

In *Mississippi*, the mayor of a town is not liable for a *bona fide* error as to his jurisdiction of a criminal case; nor would the marshal therein be liable for false imprisonment. *Bell v. McKinney*, 63 Miss. 187.

In *Montana*, a failure of a town or county officer to perform his duty, is a misdemeanor punishable by fine and imprisonment. *Montana Comp. Stat.* (1887), p. 889, § 927.

In *Nebraska*, the town treasurer must give bond in \$5,000, or double the amount of money that may come into his hands, to be fixed by the town board. *Nebraska Consol. Stat.* (1891), § 979. The town officers make oath faithfully to perform, etc., § 975.

In *New Hampshire*, the liability upon a town treasurer's bond is not discharged by his note, accepted by his successor as full payment, with assent of the selectmen. *Henniker v. Wyman*, 58 N. H. 528.

In *New Jersey*, *mandamus* lies to compel a township collector to pay over the balance to his successor, on the proper order. *State v. Disbrow*, 42 N. J. L. 141.

The sureties of a township collector are held not to be exonerated by the fact that the moneys were collected before the date of the bond. *Conover v. Middletown*, 42 N. J. L. 382.

In *New York*, as to the procedure under the law of 1887, ch. 372, to enforce the lien of a town collector's bond, against the property of the sureties, see *Crisfield v. Murdock*, 127 N. Y. 315.

The "unlawful and corrupt expenditures" by village officers, for which, under *New York Laws* (1879), ch. 307, a summary investigation may be had, do not embrace those resulting from errors of judgment with no pretense of corruption; *e. g.*, employing old and lazy

laborers, making useless and expensive gutters, etc. *Matter of East Syracuse*, 20 Abb. N. Cas. (N. Y.) 131.

One who as president of a railway company, received a town's bonds for its stock, and sold them to *bona fide* purchasers, knowing them to be invalid, was held to be not liable therefor to the town, although he was also its supervisor. *Farnham v. Benedict*, 39 Hun (N. Y.) 22.

The remedy under *New York Laws* of 1866, ch. 534, against delinquent town supervisors, extends to cases arising before its enactment. *Guilford v. Cooley*, 58 N. Y. 116. A supervisor, who is also a member of a town committee for procuring enlistments on the town quota, is held to be accountable for money received and disbursed by him, raised upon town bonds. *Guilford v. Cooley*, 58 N. Y. 116.

If a town supervisor as "trustee of the gospel and school lot" improperly invests and loses any of the funds, his successor may maintain an action for account and recovery. *Taylor v. Gurnee*, 26 Hun (N. Y.) 624.

A town supervisor's sureties are not liable for money whereof he has become a mere voluntary custodian, or which, without authority of law, is ordered by the board to be paid to him; *e. g.*, by a misdirection in the collector's tax warrant. *People v. Pennock*, 60 N. Y. 421.

As to requisites of indictment of town auditors for "official misconduct," see *People v. Castleton*, 44 How. Pr. (N. Y.) 238.

As to the requisites of allegation and proof in an action by a taxpayer, under *New York Laws* (1887), § 673, to prevent waste or injury to the town from wrong doings of officers, see *McCrea v. Chahoon*, 54 Hun (N. Y.) 577.

In *North Carolina*, every person who, on being appointed town constable, commissioner, mayor, or assessor, refuses to qualify, shall forfeit \$25. *North Carolina Code* (1883), § 3812. The town constable gives bond to the state enforceable by the commissioner, § 3809.

As to the extent of liability of town commissioners to indictment for failure to keep township roads in repair, see *State v. Halifax*, 4 Dev. (N. Car.) 345.

In *Ohio*, one appointed trustee or treasurer of a civil township, and refusing to qualify, forfeits not less than \$5 nor more than \$50. *Ohio Rev. Stat.* (1890), § 1375. Other officers, \$2, § 1449.

In *Pennsylvania*, one elected to a

4. **Compensation.**—In some states, the compensation of certain officers, as, for instance, collectors of town taxes, fence-viewers, field drivers, inspectors, lockup keepers, and pound keepers consists of fees prescribed by statute. In the absence of statute, the principles governing the compensation of municipal officers in general apply.¹

township office other than that of constable, and refusing to serve, shall forfeit \$20; except as to service more than three years in twelve. *Bright, Purd. Pennsylvania Dig. L.* (1885), p. 1638, § 6.

Township supervisors are liable to indictment for neglect to lay out or repair a public road. But they are only bound to reasonable care and promptness. *Com. v. Cassatt*, 3 Montg. Co. Rep. (Pa.) 19.

A town treasurer is chargeable with a loan to the town contracted with himself. He cannot have credit for disbursement to a bond held by himself unofficially. Only town councils can authorize payment out of the treasury. *Todd v. Patterson*, 55 Pa. St. 498.

In the absence of statutory provision therefor, no appeal lies to the supreme court to review a settlement of township officers' accounts. *Thomas v. Upper Merion Tp.*, 148 Pa. St. 116.

In *Vermont*, a liquor agent who, in excess of the limit, purchased liquors with the money of the town and sold them without consent of the selectmen, was held to be liable to the town for the proceeds; the maxim, *in pari delicto*, etc., did not apply. *Topsham v. Rogers*, 42 Vt. 189.

In *Wisconsin*, a town treasurer is liable to the town for moneys appropriated by the county, although unlawfully, and received by him, although expended by him only for the town's use, if without its direction. *Remington v. Ward*, 78 Wis. 539. As to the requisites, in an action on a town treasurer's bond, of evidence on the question of election of his successor, and of neglect to pay over moneys, see *La Pointe v. O'Malley*, 46 Wis. 35.

The liability of the sureties of a town treasurer is not affected by want of a formal approval of his bond, by the chairman of the town board. *Omro v. Kaime*, 39 Wis. 468.

As to the formal requisites of the bond of a town treasurer, see *Platteville v. Hooper*, 63 Wis. 381.

1. See PUBLIC OFFICERS, vol. 19, p. 555; *Connecticut Gen. Stat.* (1888), §

3735 *et seq.*; *Massachusetts Pub. Stat.* (1882), pp. 120 *et seq.*, 230, 275, 368 *et seq.*; *New Hampshire Pub. Stat.* (1891), pp. 193, 346, 379.

In *Alabama*, of the salaries of officers, \$25 per month is exempt from garnishment. *Alabama Code* (1886), § 2512.

In *Arkansas*, the town council prescribes the compensation of the town officers. *Arkansas Dig. Stat.* (1884), § 796. No officer's emoluments shall be increased or diminished during his term, § 926.

In *California*, as to the compensation of officers of the six classes of the municipal corporations respectively, see *California Act of 1883*; *California Pol. Code App.* (1883), p. 737 *et seq.*

A promise to pay a municipal officer an extra compensation for meritorious services, was held not to be binding. *Heslep v. Sacramento*, 2 Cal. 580.

In *Colorado*, in towns and cities of not more than 5000 inhabitants, neither the mayor, aldermen, or trustees can receive any compensation unless a majority of the legal voters vote in favor thereof; any ordinance therefor is void. *Colorado Annot. Stat.* (1891), § 4537.

In the *Dakotas*, "The trustees, clerk, assessor, treasurer, marshal, and justice of the peace shall respectively receive for their services, such compensation as the board of trustees in their by-laws may decide." Other town officers receive a "just and reasonable compensation." *Dakota Comp. Laws* (1887), § 1069.

In *Georgia*, for a very detailed specification of the fees of justices and constables, see *Georgia Code* (1882), §§ 3699, 3700. The town council fixes the compensation of the mayor, recorder, and marshal; and it is not to be increased or diminished during the term. *Georgia Code* (1882), § 793. "The general assembly shall not grant or authorize extra compensation to any public officer, agent, or contractor, after the service has been rendered, or the contract entered into," § 5202. *Georgia Const.*, art. 8, § 16, pl. 2.

A town marshal *de facto* was held entitled to compensation only for the time he actually served. *Miller v. Seney*, 81 Ga. 489.

In *Illinois*, under the town organization law, the clerk, the supervisor, or the justice of the peace, remains in office until his successor is qualified, even though his resignation had been accepted; and accordingly he remains responsible as member of the board of auditors. *Badger v. U. S.*, 93 U. S. 599.

The president and town trustees hold office till their successors are elected, even though they neglect to give the statutory notice. *Mandamus* lies to compel the notification. *People v. Fairbury*, 51 Ill. 149.

In *Indiana*, a township trustee is entitled to a compensation of only two dollars per day; and this, though on the same day he may have performed two classes of service. *Montgomery County v. Bromley*, 108 Ind. 158; *Posey County v. Templeton*, 116 Ind. 369.

In *Indiana*, the fact that on a tie vote for the election of township trustees, the incumbent (who was one of the candidates), refused to comply with the statute in case of a tie, was held not to create a vacancy. *State v. McMullen*, 46 Ind. 307.

In *Iowa*, in the absence of statutory provision, the mayor of an incorporated town cannot recover from the county for services as a magistrate where the prosecution fails. *Howland v. Wright County*, 82 Iowa 164.

A resolution assuming to supersede an audience as to the compensation of the city attorney, was held invalid. *Ryce v. Osage* (Iowa, 1893), 55 N. W. Rep. 532.

In *Maine*, a town clerk is entitled to compensation for recording a birth occurring before his election, but coming to his knowledge thereafter. Otherwise as to his supplying, without the town's direction, a previous record destroyed by fire. *Lake v. Ellsworth*, 40 Me. 343.

A substitute schoolhouse janitor holding himself ready for service, was held entitled to draw his salary from the municipality, whether actually at work or not. *Davis v. Fall River*, 155 Mass. 96.

A school agent's election, and the rendition of service, was held not to imply a promise of the town to pay him; no statute providing therefor. *Talbot v. East Machias*, 76 Me. 415.

One who was selectman, town agent,

and overseer of the poor, secured a pension for a pauper, and in pursuance of a previous agreement with her, appropriated it to settle the town's claim for her support. She afterwards recovered it from him by suit. It was held that he was not entitled to compensation from the town for the expenses therein incurred by him. *White v. Levant*, 77 Me. 396.

Where no statute has prescribed any compensation for a town officer, he can recover none without a town vote therefor. *White v. Levant*, 78 Me. 568.

As to when *mandamus* is a municipal officer's proper remedy to recover his salary, etc., see *Baker v. Johnson*, 41 Me. 15; *French v. Cowan*, 79 Me. 426.

In *Massachusetts*, a selectman cannot maintain an action against a town for official services for which no compensation has been provided, either by statute, vote, or express contract; evidence of customary payment by towns for such services is immaterial. *Farnsworth v. Melrose*, 122 Mass. 268.

A town vote determining what would be a reasonable compensation for certain officers of the fire department, was held to import a contract to pay the same. *Parks v. Waltham*, 120 Mass. 160.

Under *Massachusetts* Gen. Stat., ch. 24, the vote of a town having a duly established fire department, to pay members of a private organization, not engine-men, under § 14 or § 15, for services rendered to the town as engine men for the preceding year, was held to be *ultra vires* and void. *Greenough v. Wakefield*, 127 Mass. 275.

In *Michigan*, silence of a village charter as to compensating a board of water commissioners, was held to indicate that their services were expected to be voluntary; notwithstanding a provision that officers receive such compensation as the council shall prescribe. *Perry v. Cheboygan*, 55 Mich. 250.

In *Missouri*, the township clerk is paid fixed fees. The other officers each receive \$1.50 *per diem* for their services. *Missouri* Rev. Stat. (1889), § 8484.

As to when, in a statute, the words, "reasonable compensation," import that the compensation is to be fixed by the court in which the condemnation proceeding is pending, see *Green v. St. Louis*, 106 Mo. 454.

In *Nevada*, the compensation of the chief engineer of the fire department must not exceed \$150 per month; that of his assistant, \$125, and that of each

employé therein, \$100. *Nevada* Gen. Stat. (1885), § 2024.

Under a statute that policemen "shall receive such compensation as shall be voted by the town," none can be recovered without a vote fixing the rate. *Sampson v. Rochester*, 60 N. H. 477.

In *New Hampshire*, a selectman's acceptance of the office, and serving without objecting to the sum voted as compensation, was held to be a contract at that price. *Rindge v. Lamb*, 58 N. H. 278.

In *New Jersey*, each member of the township committee receives \$2 per day, and the clerk \$3. *New Jersey* Revision (1877), p. 1200, § 37.

The *New York* Act of 1880, that "the compensation or salary of any officer shall be fixed before his appointment," does not require a fixing before each new appointment. *People v. Crissey*, 91 N. Y. 616.

As to the allowance of a highway commissioner's claim against the town, *mandamus* will not lie to compel the board of auditors to decide in a particular way. *People v. Barnes*, 114 N. Y. 317.

The facts of an attorney's rendition of services to a town, and of a resolution of the board of auditors to pay for similar services, were held not conclusive of an undertaking of the town to audit and allow his claim therefor. *People v. Wood* (Supreme Ct.), 12 N. Y. Supp. 436.

Overseers of the poor are not precluded from audit and allowance for supplies procured on their credit, merely by their failure to follow the statutory procedure. *Osterhoudt v. Rigney*, 98 N. Y. 222.

As to the right of suspension of an officer—*e. g.*, an aqueduct inspector—without pay, "owing to lack of work," see *Kelly v. New York*, 70 Hun (N. Y.) 208; *Donnell v. New York*, 68 Hun (N. Y.) 55.

In *North Carolina*, as to what is a reasonable town ordinance regulating the compensation of a cotton weigher, see *State v. Tyson*, 111 N. Car. 687.

In *Ohio*, a trustee or a supervisor receives \$1.50 per day of actual service. The township treasurer has two per centum of the money received, kept and paid out. *Ohio* Rev. Stat. (1890), §§ 1530-3.

In *Oklahoma*, as to the compensation of municipal officers, see *Blackburn v. Oklahoma*, 10 Okl. 292.

In *Pennsylvania*, each township

auditor receives "the sum of one dollar per day for each day necessarily employed in the duties of their office." *Bright. Purd. Pennsylvania* Dig. L. (1883), p. 1641, § 34. The treasurer receives a percentage, settled by the supervisors, with approbation of the auditors, § 25. The supervisors determine the town clerk's compensation, § 27.

As to the unchangeableness of the salary of a municipal officer when once fixed, even though under an unconstitutional act, see *Devers v. York*, 156 Pa. St. 359.

Under *Vermont* Rev. L., § 2728, a town officer—*e. g.*, a lister—can recover only such pay as is fixed by statute, or by vote of the town. The case is not affected by the precedent of allowance in a former year. *Barnes v. Bakersfield*, 57 Vt. 375.

A town officer has no legal claim for his services, except by express vote or by a usage to pay that office—*e. g.*, school committee. *Boyden v. Brookline*, 8 Vt. 285.

A first constable and *ex officio* collector is not entitled to fees for taxes previously collected by the town treasurer, except under an existing agreement; a subsequent promise to pay them is without consideration. *Woodward v. Rutland*, 61 Vt. 316.

A highway surveyor cannot recover from the town an amount expended by him in excess of a tax committed to him. *Cloud v. Norwich*, 57 Vt. 448.

In *Washington*, "The mayor and members of the council shall receive no compensation whatever. The clerk, treasurer, marshal and police justice shall severally receive, at stated times, a compensation to be fixed by ordinance by the council, which compensation shall not be increased or diminished after their election or during their several terms of office." *Washington* Gen. Stat. (1891), § 666. And see *State v. Carson*, 6 Wash. 250.

In *West Virginia*, the mayor, recorder, assessor, and road superintendent receive each a compensation to be fixed by the council, and not to be increased or diminished during the term. *West Virginia* Code (1891), p. 431, § 42.

In *Wisconsin*, the general town officers receive \$2 per day for actual service, and in only one official capacity. *Wisconsin* Annot. Stat. (1889), § 850. The assessors receive what the town board allows them, not exceeding \$3 per day, § 851.

5. **Termination.**—The principles governing the power to remove municipal officers, and the effect of removal, as laid down elsewhere in this work,¹ apply to towns, in the absence of any statutory provision to the contrary. In general, the appointing power is also the removing power. In many states, the statutes define what shall constitute vacation of an office.²

VIII. DISCONTINUANCE.—Ordinarily, the general principles as to

1. See PUBLIC OFFICERS, vol. 19, p. 562a.

2. In *Alabama*, an office "is vacated by the death of the incumbent; by his resignation, except in such cases as are excepted by law; by his ceasing to be a resident of the state or of the division . . . for which he was elected; by the decision of a competent tribunal declaring his election or appointment void, or his office vacant; by an act of the general assembly abridging his term of office, when the same is not fixed by the constitution; in such other cases as are, or may be, declared by law." *Alabama Code* (1886), § 308.

In *Arkansas*, the mayor or any other town officer may be removed by the concurrent vote of five councilmen. *Arkansas Dig. Stat.* (1884), § 799.

In *California*, as to tenure, etc., in the six classes of municipal corporations, see the Act of 1883, *California Pol. Code*, p. 737 *et seq.*

In *Colorado*, when the tenure of a municipal office is at the pleasure of the appointing body, the power to remove may be exercised without notice or hearing; otherwise as to removal from any office — *e. g.*, of alderman — which is of the essence of the corporation. So held, as to a council's removal of a police magistrate. *Carter v. Durango*, 16 Colo. 534, citing 1 Dill. on Mun. Corp., § 250; *Hudson v. Denver*, 12 Colo. 157.

In *Georgia*, gambling by the marshal is not "malpractice" and ground for his removal. *Macon v. Shaw*, 16 Ga. 172. A marshal removed by the mayor and council for a cause not specified in the charter, may recover of them the damages necessarily resulting from his amotion, namely, his salary and perquisites. *Shaw v. Macon*, 19 Ga. 468. A marshal's failure to prosecute for an offense committed in his presence, is ground for his removal. *Shaw v. Macon*, 21 Ga. 281. One employed by the firemasters at will, cannot recover for his discharge. *Parks v. Atlanta*, 76 Ga. 828.

In *Illinois*, as to what constitutes a vacancy in the office of town super-

visor, see *Oregon v. Jennings*, 119 U. S. 74.

One is not relieved from the duties of a municipal office, until his resignation is accepted by competent authority. *People v. Williams*, 145 Ill. 573.

In *Indiana*, a marshal's failure to give bond within the ten days' requirement of the town charter, was held not to vacate the office. *State v. Porter*, 7 Ind. 204.

In *Kansas*, in the absence of statutory declaration, the office of township treasurer is not vacated by his removing "across the line" into another township, without resignation. *Salamanca Tp. v. Wilson*, 109 U. S. 627. When the legislature abolishes a municipal township, the officers must go. *In re Hinkle*, 31 Kan. 112.

In *Maine*, as to the construction of the *Maine Const.*, art. 9, § 6—tenure of all officers "not otherwise provided for,"—see Opinion of Justices, 72 Me. 549.

In *Massachusetts*, a breach of a regulation forbidding a municipal officer to solicit political contributions, was held to be good cause for his removal. *McAuliffe v. New Bedford*, 155 Mass. 216.

In *Michigan*, there is no inherent power in a governing body to remove, even for cause, an appointive officer. Such power is not imported by a statutory requirement that an officer upon his resignation or "removal," shall deliver to his successor the books, etc.; express provision is necessary. *Speed v. Detroit Council*, 97 Mich. 198. Compare *Speed v. Detroit Council* (Mich. 1893), 56 N. W. Rep. 570.

In *Minnesota*, if the president of the council is not an "officer" of the municipality, within the charter or state constitution, he is removable at the will of the council that elected him. *State v. Kilchli* (Minn. 1893), 54 N. W. Rep. 1069.

"Sufficient cause," in a municipal charter's provision for removal of officers, has been held to mean legal cause.

the dissolution of municipal corporations, apply to towns.¹ In many states, the procedure for disincorporation of towns is prescribed by statute.² And in general, the corporate existence of

State *v. Duluth* (Minn. 1893), 55 N. W. Rep. 118.

In *Missouri*, under a municipal charter authorizing the removal of an appointed officer, if the general welfare demands it, such removal may be by ordinance. State *v. Walbridge* (Mo. 1893), 24 S. W. Rep. 457.

In *Nebraska*, an express charter provision for the removal of municipal officers, was held to dominate a general provision. State *v. Smith*, 35 Neb. 131.

In *New Hampshire*, a town officer's neglect to take the oath of office does not, *ipso facto*, vacate the office. *Glidden v. Towle*, 31 N. H. 147.

In *New Mexico*, "by the concurrent vote of four members of the board of trustees ('*fidei comisarios*') the mayor, recorder, or any member of said board, or any other officer of the corporation, may be removed from office," on written charges, hearing, etc. Also, cessation of residence within the town is a ground for removal. *New Mexico Comp. L.* (1884) 1691.

In *New York*, although by the act of incorporation, village trustees may hold over till others are elected, they will be ousted if they neglect to notify of an election. *People v. Bartlett*, 6 Wend. (N. Y.) 422.

A municipal council may remove its president, though there is no rule prescribing the procedure. *Armitage v. Fisher* (Supreme Ct.), 26 N. Y. Supp. 364.

In *Ohio*, the offices of township trustee, treasurer, and clerk, are abolished by merger with a municipality. *Ohio Rev. Stat.* (1890), § 1623.

In *Pennsylvania*, a *per diem* compensation to the high constable of a borough as lamplighter, was held not to import an office that could not be discontinued by the council. *Bigley v. Bellevue*, 158 Pa. St. 495.

The *Pennsylvania* Act of 1889, P. L. 298, was held to repeal, by implication, the acts of 1834 and 1837; and the office of assistant assessors in townships no longer exists. *Assistant Assessors' Case*, 1 Pa. Dist. Ct. Rep. 142.

As to when officers under a void town incorporation may be ousted by *quo warranto*, see *Harness v. State*, 76 Tex. 566.

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1198. See also PUBLIC OFFICERS, vol. 19, p. 562a.

A municipal charter is not a contract; it is subject to repeal at the pleasure of the legislature. *Probasco v. Moundsville*, 11 W. Va. 501; *Montgomery v. Shoemaker*, 51 Ala. 114. This, however, has reference to the municipality's governmental relation to the state; in its private or proprietary rights, it is entitled to constitutional protection. *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79.

2. In the territories, a distinction is to be drawn as to plats; the Act of Congress of 1886, regulating territorial legislation, inhibiting laws vacating town plats. See 24 U. S. Stat. at L., p. 170, § 1, pl. 4.

In *Alabama*, a town charter cannot, in a collateral proceeding, be declared forfeited by non-user. *Harris v. Nesbit*, 24 Ala. 398. Non-user of the corporate powers does not, *ipso facto*, work a dissolution. *Ex p. Moore*, 62 Ala. 71.

In *Arizona*, the board of county supervisors may disincorporate any city, village, or township, after petition, notice, and vote therefor by a majority of its qualified electors. *Arizona Rev. Stat.* (1887), § 148 *et seq.* The dissolution shall affect no previous contract, § 166.

In *Arkansas*, as to surrender and repeal of charters of towns and cities, see *Arkansas Dig. Stat.* (1884), § 926 *et seq.*

In *California*, as to change, reincorporation, etc., of towns and cities, see Act of 1883, *California Pol. Code*, p. 738, § 5.

In *Colorado*, the corporate existence is not affected by a change in the time of holding the annual election. A mistake therein raises no presumption of fraud on the part of the town authorities. *People v. Keeling*, 4 Colo. 129.

In *Idaho*, any attempt of town trustees to disincorporate a town, is void. *Idaho Rev. Stat.*, § 2230, gives no authorization therefor. *People v. Bancroft*, 2 Idaho 1077.

In *Illinois*, township organization of a county may be discontinued on application of one-fifth of the legal voters to the county board, election, etc. *Illinois Rev. Stat.* (1891), p. 1489.

In *Indiana*, a town corporation may

towns is subject to the legislative control of the state creating them.¹

TOXICOLOGY.—(See ABORTION, vol. 1, p. 28; DRUGGIST, vol. 6, p. 31; HOMICIDE, vol. 9, p. 548; MEDICAL JURISPRUDENCE, vol. 15, p. 248; POISONS AND POISONING, vol. 18, p. 736.)

be dissolved on application of one-third of the legal voters, presented to the town trustees, election, etc. *Indiana Rev. Stat.* (1888), § 3318.

Not only the original proprietors, but their grantees, may vacate a town plat. *McGrew v. Lettsville*, 71 Iowa 150.

In *Mississippi*, "If in any case the census shows that a municipality hereafter created contains less than one hundred souls, the governor shall issue his proclamation abolishing the same." *Mississippi Code* (1892), § 2919. But he is not compelled to do so where he believes the returns to be fraudulent, § 2920.

In *Nevada*, the county board may, on petition of the majority of the legal voters, disincorporate a city or town. *Nevada Gen. Stat.* (1885), § 2079.

In *New Mexico*, as to the procedure for disincorporation, see *New Mexico Comp. L.* (1884), § 1699.

In *North Carolina*, on repeal of a town charter, moneys collected and in hand may be controlled by the courts. *Lilly v. Taylor*, 88 N. Car. 489.

In *Oregon*, as to the vacation of the plat of a town that fails to improve, see *Oregon Annot. L.* (1892), § 4178 *et seq.*

In *Tennessee*, a municipality cannot be dissolved by *quo warranto* proceedings. The charter may be repealed by a direct act of the legislature. *State v. Waggoner*, 88 Tenn. 290.

If, after a town organized under the general law has accepted a special charter and been organized thereunder, this charter be repealed, the town is no longer an incorporated municipality. *Burk v. State*, 5 Lea (Tenn.) 349.

A suit pending against the old municipality at the time of repeal of its charter and reincorporation under a new name, may be revised against the new corporation. *O'Connor v. Memphis*, 6 Lea (Tenn.) 730.

In *Texas*, the incorporation of a town or village may be abolished on petition of fifty voters to the county judge, and a vote therefor of two-thirds of the voters of the town. *Texas Rev. Civil Stat.*, art. 541. As to the effect of a void incorporation, see *Ewing v. Dallas County*, 83 Tex. 663.

In *Utah*, a town may be disincorporated

on petition of three-fourths of the taxpayers, directed to the town board of trustees, notice, election, etc. *Utah Sess. L.* (1890), p. 81.

In *West Virginia*, a town charter is repealable at the will of the legislature. *Probasco v. Moundsville*, 11 W. Va. 501.

In *Wisconsin*, as to the county board's vacating a town plat, see *Wisconsin Annot. Stat.* (1889), § 670. As to the proceedings of the circuit court therein, see § 2265. As to the requisites of the notice, see *State v. Milwaukee County*, 58 Wis. 4.

1. *Mount Pleasant v. Beckwith*, 100 U. S. 514. In this case, involving the effect of *Wisconsin Statutes* of 1856 and 1857, changing the boundaries of Mount Pleasant, Caledonia, and Racine, a majority of the court held that when a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities, and severally liable for a proportionate share of all its then subsisting legal debts, and vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing thereon; legislation is not necessary to create a legal obligation against the new town or to make the apportionment of the debt. Accordingly, the remedy of the creditors of the extinguished corporation is in equity against the corporations succeeding to its property and powers. Upon this case, and *Beckwith v. Racine*, 7 Biss. (U. S.) 142, it has been remarked (in *Dill. on Mun. Corp.* (4th ed.) 254), that "There is no intimation in later decisions of the supreme court that they are, in any respect, inconsistent with this judgment. . . . But it seems difficult to the author to reconcile all of the reasoning by which the different judgments are supported." Compare *Meriwether v. Garrett*, 102 U. S. 472; *Amy v. Watertown*, 130 U. S. 301; this case (at p. 319), *distinguishing* *Broughton v. Pensacola*, 93 U. S. 266, and *Mobile v. Watson*, 116 U. S. 289, where an old municipality, by its new name, was held liable for the old debts.

TRACKS.—(See RAILROADS, vol. 19, p. 775; STREET RAILWAYS, vol. 24, p. 937; TAXATION, vol. 25, p. 495; TAXATION (CORPORATE), vol. 25, p. 651.)

TRADE.—(See also BUSINESS, vol. 2, p. 700; FOREIGN, vol. 8, p. 281; PAY, vol. 18, p. 144; MARRIED WOMEN, vol. 14, p. 669; TAXATION, vol. 25, p. 479.)

The word trade in its most restricted sense is confined to the business of buying and selling in commerce or exchange.¹ In exemption laws, it is generally confined to the occupation of a mechanic.² But it is generally used in a broader sense, as equivalent to any occupation, employment, or business, whether manual or mercantile.³

1. Webster's Dict.

2. *Enscoe v. Dunn*, 44 Conn. 93; *Seeley v. Gwillim*, 40 Conn. 109.

In *Atwood v. DeForrest*, 19 Conn. 513, in reference to the word as used in such a statute, it was said: "By the word 'trade,' as used in this statute, we suppose is meant the business of a mechanic, strictly speaking; as the business of a carpenter, blacksmith, silversmith, printer, or the like; and that it was not intended to include the business of a manufacturer, any more than it was intended to extend to the business of a merchant or farmer."

In *Whitcomb v. Reid*, 31 Miss. 569, the term was defined to denote the business or occupation which a person has learned and which he carries on for procuring subsistence or employment, particularly mechanical employments, as distinguished from the liberal arts and learned professions, and from agriculture. And it was held that dentistry was not a trade.

So in *Massachusetts*, the law exempting tools, implements, etc., necessary for carrying on a trade or business, has been held to be intended for the protection of mechanics, artisans and handicraftsmen, and others whose manual labor and skill afford means of earning their livelihood. *Wallace v. Bartlett*, 108 Mass. 53. It has been accordingly applied to tailors, shoemakers, milliners, fiddlers, and carriage makers. *Dowling v. Clark*, 1 Allen (Mass.) 282; *Daniels v. Hayward*, 5 Allen (Mass.) 43; *Rayner v. Whitcher*, 6 Allen (Mass.) 292; *Woods v. Keyes*, 14 Allen (Mass.) 236; *Goddard v. Chaffee*, 2 Allen (Mass.) 395; *Eager v. Taylor*, 9 Allen (Mass.) 156. But has been held not to include those merely engaged in the business of buying and selling merchandise; nor to exempt weights and measures, horses and car-

riages, and other articles used by them in their trade. *Wilson v. Elliot*, 7 Gray (Mass.) 69; *Gibbs v. Gibbs*, 9 Gray (Mass.) 62; *Reed v. Neale*, 10 Gray (Mass.) 242.

In *Speak v. Powell*, L. R., 9 Exch. 25, it was held that the business of a traveling circus was not a trade, and carriages belonging to a circus were not such as were used for the conveyance of goods or merchandise in the course of trade, so as to be within a statute exempting such.

3. *In re Pinkney*, 47 Kan. 89; *May v. Sloan*, 101 U. S. 231.

In *The Schooner Nymph*, 1 Sumn. (U. S.) 517, in interpreting the word as used in the statute, declaring that "If any vessel or ship shall be employed in any other trade than that for which she is licensed, she shall be forfeited," Story, J., said: "The word 'trade' is often, and indeed, generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit or gain or livelihood, not in the liberal arts or the learned professions, it is constantly called a 'trade.'" In this case it was held that codfishery was a trade.

In this extended sense the word is understood in the *Boat Eliza*, 2 Gall. (U. S.) 4, and in *U. S. v. Brig Eliza*, 7 Cranch (U. S.) 113. In both of these cases, the vessels were employed in the transportation of merchandise on freight or for hire, and were held to be within the operation of the statute. See also *Two Friends*, 1 Gall. (U. S.) 118.

In *Bank of India v. Wilson*, 3 Exch. Div. 108, it was held that the business of a telegraph company was a trade within the meaning of a statute exempting premises occupied for purposes of

TRADE, BOARD OF; PRODUCE EXCHANGE, ETC.

TRADE, BOARD OF; PRODUCE EXCHANGE, ETC.—In the *United States*, a board of trade is an association of business men established in most large cities for the furtherance of commercial interests, the enactment of rules for the regulation of trade, and the consideration of legislation affecting banking, insurance, railroads, customs, etc.; a chamber of commerce.¹ These associations are variously known as boards of trade, chambers of commerce, commercial exchanges, cotton exchanges, corn exchanges, etc., and differ from the stock exchange in no legally essential matter except that they are usually incorporated,²

trade. Kelly, C. B., said: "Undoubtedly, if we are to take the terms of the purposes of trade as relating only to the business of buying and selling, no one can say there is any buying or selling in carrying on the business of a telegraph company. It was never the intention of the legislature to so limit the meaning of the word 'trade.' It is not only the literal meaning of the word that is to be regarded. In literature of all description, both prose and verse, we find that the word 'trade' is often used in a much more extensive signification, and may indicate merely the operation or occupation of buying and selling."

On a covenant by a lessee not to use premises for the purposes of trade or business, it was held that the lessee could restrain the use of the premises as a home for working girls, even though it appeared that no profits were made; the payments made by the inmates being insufficient to pay the working expenses of the home. *Rolls v. Miller*, 25 Ch. Div. 206. But see *Wetherell v. Bird*, 2 Ad. & El. 161; 29 E. C. L. 57, where it was held that such a lease was not forfeited by using the premises as a private lunatic asylum; the word trade in the covenant being applicable only to a business conducted by buying and selling.

Trade and Commerce.—The words "trade" and "commerce" are not synonymous; the latter relates to dealing with foreign nations; the former to dealing between members of the same community. *People v. Fisher*, 14 Wend. (N. Y.) 15.

The Trade of Merchandise.—Any person engaged in business; the purchase of articles to be sold again either in the same or an improved shape, must be regarded as using the trade of merchandise. *Wakman v. Hoyt*, 5 Law Rep. 309. See also *Spring v. Gray*, 6 Pet. (U. S.) 151.

The taking of goods by one purchaser on agreement to account to the merchant, is not a trade of merchandise between merchant and merchant, within the *New York Statute of Limitations*. *Murray v. Coster*, 20 Johns. (N. Y.) 576.

In a Will.—In *Dandridge v. Washington*, 2 Pet. (U. S.) 370, the word "trade," as used in a will, was held to denote one of the mechanical arts, and the intention that it was applicable to one of the learned professions was not allowed.

Trade Price.—The measure of damages for breach of a contract to pay a thousand dollars in goods at the regular trade price, is a sum which bears the same proportion to the thousand dollars that the market price on the goods does to the regular trade price. *Meserve v. Ammidon*, 109 Mass. 415.

1. *Century Dict.*, tit. "Trade."

"In Great Britain the board of trade is a committee of the privy council which has, to a large extent, the supervision of British commerce and industry. At its head are the president of the board of trade, who is usually a member of the cabinet, the parliamentary secretary, formerly vice-president, the permanent secretary, and six assistant secretaries, at the head of six departments, the commercial, harbor, finance, railway, marine, and fisheries. Attached to the board of trade are also the bankruptcy and emigration departments, the patent office, etc. A committee for trade and the plantations existed for a short time in the reign of Charles II. The council of trade was again instituted in the reign of Wm. III., but discontinued in 1782. In 1786, the board of trade was organized and its functions were subsequently greatly extended." *Century Dict.*, tit. "Trade"

2. **Chicago Board of Trade.**—In *Stock Exchange v. Board of Trade*, 127 Ill. 156, the court said: "The objects of

TRADE, BOARD OF; PRODUCE EXCHANGE, ETC.

whereas stock exchanges are generally and more frequently unincorporated.¹

From this difference in organization arise certain other distinguishing features. For example, the members of an incorporated board of trade are not individually liable for the debts of the association,² while the members of a stock exchange may be so liable.³ The board of trade may sue and be sued as any other corporation, but the members of a stock exchange become parties to actions as individuals, or the association as a body becomes a party under some statutory provision.⁴ A corporation has inherent power to suspend or expel its members for certain offenses, but the unincorporated association probably has not this power in the same degree.⁵ The members of the corporation who are wrongfully expelled may seek the assistance of a court of law by a writ of *mandamus*; but members of the unincorporated association must under such circumstances look to a court of equity for their relief.⁶ The stock exchange, it seems, has absolute control of the matter of furnishing to the public information of the business transacted on its floor; but it has been held that an incorporated board of trade may not discriminate against individuals when once it has undertaken to furnish quotations to the public.⁷ The legal character of seats is the same in both associations.⁸ There

the board of trade of the city of Chicago are to maintain a commercial exchange and to promote uniformity in the customs and usages of merchants, to inculcate principles of justice and equity in trade, to facilitate the speedy adjustment of business disputes, to acquire and disseminate valuable commercial and economical information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits. The association existed some years prior to the 18th day of February, 1859, as a mere voluntary and unincorporated society of persons engaged in the grain, produce, and commission business, and at that date it was incorporated by a special act of the general assembly of the State of *Illinois* and was given power and authority to do and carry on business such as is usual in the management of boards of trade or chambers of commerce, and the specific powers enumerated in the act of incorporation." See also *Barclay v. Smith*, 107 Ill. 349; *Weaver v. Fisher*, 110 Ill. 146.

The Chicago Live Stock Exchange is also a corporation, but not for pecuniary profit. *American Live Stock Com. Co. v. Chicago Livestock Exchange*, 143 Ill. 210.

The St. Louis Merchants' Exchange is a corporation. *Albers v. St. Louis Merchants' Exchange*, 39 Mo. App. 583; *Warren v. St. Louis Merchants' Exchange*, 52 Mo. App. 157.

The New York Produce Exchange is incorporated. *Hurst v. New York Produce Exchange*, 100 N. Y. 605.

The Milwaukee Chamber of Commerce is a corporation. *State v. Milwaukee Chamber of Commerce*, 20 Wis. 63; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670.

The Toronto Corn Exchange is a corporation. *Cannon v. Toronto Corn Exchange*, 5 Ont. App. 268.

1. See STOCK EXCHANGE, vol. 23, p. 749.

2. See CORPORATIONS, vol. 4, p. 184; STOCKHOLDERS, vol. 23, p. 776.

3. See STOCK EXCHANGE, vol. 23, p. 753.

4. See STOCK EXCHANGE, vol. 23, p. 758.

5. See STOCK EXCHANGE, vol. 23, p. 759, where the cases are to be found.

6. See STOCK EXCHANGE, vol. 23, p. 764, where the distinction is examined upon authority.

7. See STOCK EXCHANGE, vol. 23, p. 765, and note.

8. See STOCK EXCHANGE, vol. 23, p. 754.

TRADE COMBINATIONS AND CORPORATE TRUSTS.

appears to be no difference in the power of the two associations to make and enforce rules for the transaction of business on their respective floors.¹

The law respecting the rights and duties of commission merchants and brokers who transact business as members of such associations, their relations to each other and to customers whom they represent, and the validity of contracts which they make, may be found in other titles of this work.²

TRADE COMBINATIONS AND CORPORATE TRUSTS.—(See also **CONTRACTS**, vol. 3, p. 823; **CORPORATIONS**, vol. 4, p. 184; **RAILROADS**, vol. 19, p. 775; **RAILROAD POOLS**, vol. 19, p. 691; **ULTRA VIRES**.)

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|---|---|
| I. Definition, 229. | 2. <i>Rights of Dissenting Stockholders</i> , 236. |
| II. Classification of Trusts, 229. | 3. <i>Rights of the Members of the Trust</i> , 236. |
| III. Legality of Trusts, 231. | 4. <i>Rights of the Certificate Holders</i> , 236. |
| 1. <i>Of Co-partnership Trusts</i> , 231. | 5. <i>Rights of the Trustees</i> , 237. |
| 2. <i>Of Stockholding Corporations</i> , 233. | 6. <i>Rights of Third Persons</i> , 237. |
| 3. <i>Of Monopolistic Trusts</i> , 234. | V. Statutory Prohibitions of Trusts, 237. |
| 4. <i>By Governing Committees</i> , 235. | |
| IV. Effects of Forming a Trust, 235. | |
| 1. <i>Rights of the State</i> , 235. | |

1. DEFINITION.—The word "trust," as applied to combinations of business corporations, is of very recent origin. Such a trust has been defined as "an organization of persons or corporations formed mainly for the purpose of regulating the supply and price of commodities."³

II. CLASSIFICATION OF TRUSTS.—These trusts have assumed four principal forms:⁴ (1) A co-partnership of corporations in the

1. See **STOCK EXCHANGE**, vol. 23, p. 767.

2. See **COMMISSION MERCHANTS**, vol. 3, p. 317; **BROKERS**, vol. 2, p. 571; **STOCK-BROKERS**, vol. 23, p. 699; **CONTRACT**, vol. 3, p. 823; **AGENCY**, vol. 1, p. 331.

For the validity of contracts made through members of the board, see **GAMBLING CONTRACTS**, vol. 8, p. 1004 *et seq.*; **STOCK-BROKERS**, vol. 23, pp. 723, 737; **ILLEGAL CONTRACTS**, vol. 9, p. 895; **ILLEGAL SALES**, vol. 9, p. 927; **CONTRACT**, vol. 3, p. 873.

3. *Black's Law Dict., sub nom. "Trusts."* Many other definitions of trusts have been given by recent legal writers. Thus, in *Cook's Stock, Stockholders, and Corporation Law* (2d ed.), § 503a, it is said: "The word 'trust' was first used to mean an agreement, between many stockholders in many corporations, to place all their stock in the hands of trustees and to receive

therefor trust certificates from the trustees. But the word 'trust' has a wider and more popular use. It is used to designate any combination of producers for the purpose of controlling prices and suppressing competition."

"A trust may be defined as a more or less intimate combination of business corporations or manufacturers for supposed mutual advantage." Henry Wood in *The Forum*, vol. 5, p. 585.

A trust has also been defined as "essentially an agreement among producers and vendors of a certain sort of merchantable commodity for their mutual protection and profit in business." Charles F. Beach in *The Forum*, vol. 8, p. 61.

4. "Car trusts" have sometimes been classed among the trusts herein referred to. But as these organizations are simply associations or partnerships which lease and make railroad cars, without attempting to regulate the

TRADE COMBINATIONS AND CORPORATE TRUSTS.

form of a joint-stock company;¹ (2) a corporation that owns the stock of other corporations;² and (3) a corporation, association or individual that buys or leases the property of other corporations and persons engaged in the same line of business;³ (4) organizations created for the purpose of regulating and controlling the private enterprises of their members.⁴

supply or price of such cars, they do not come within the definition above given. See *Ricker v. American L. & T. Co.*, 140 Mass. 346; 12 Am. & Eng. Corp. Cas. 1. The same reasoning excludes also combinations of a majority of the stockholders in a single corporation to unite their stock under one management, so as to control the corporation.

1. The Sugar Refineries Company of *New York*, popularly known as the "Sugar Trust," was a trust of this kind. It consisted of a combination of all the sugar refiners in the State of *New York*, and was created by a written instrument, which is quoted in full in the case of *People v. North River Sugar Refining Co.*, 121 N. Y. 585; 18 Am. St. Rep. 483. This instrument, which was executed by the stockholders of the respective corporations, provided that all the stock of said corporations should be transferred to trustees, who were to issue in exchange for such stock what are known as "trust certificates." These trustees controlled the management of all the corporations, took all their profits and put them into a common fund, to be distributed among the holders of the "trust certificates."

In speaking of a similar organization, the American Cattle Trust, Judge Hallett, of *Colorado*, said: "The stock was transferred to the trust, not for the purposes of being sold, but to give control of the corporations, to make the officers puppets in the hands of the trust, and thus substitute the latter as the governing body of the corporations. In other words, the purpose of the association was not to buy and sell corporations in open market, but to manage and control them." *Gould v. Head*, 38 Fed. Rep. 886.

Another example of this kind of trust is the Standard Oil Trust, whose articles of agreement are given in full in the case of *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1. See also *Rice v. Rockefeller*, 134 N. Y. 174.

Still another example of this kind of trusts was the Distillers' and Cattle Feeders' Trust, although it was subse-

quently incorporated under the laws of *Illinois*. See *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656. See also *Gould v. Head*, 38 Fed. Rep. 886, where it appeared that the American Cattle Trust was a voluntary association holding the stock of various corporations as trustee, without power to sell or alienate the same.

The fact that these trusts are in the form of joint-stock companies does not render them any the less copartnerships, since joint-stock companies are in effect only copartnerships having some of the qualities of corporations, or, in other words, partnerships with transferable shares. *Phillips v. Blatchford*, 137 Mass. 510; *Taft v. Ward*, 106 Mass. 518. See JOINT-STOCK COMPANIES, vol. 11, p. 1036.

2. Such a trust was the Chicago Gas Trust Company, whose certificate of incorporation stated that one of the objects for which the company was incorporated was "to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good will, rights and franchises of any gas works or gas company or companies." See *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319.

For the nature and history of the transactions of the *Crédit Mobilier of America*, see *Crédit Mobilier v. Com.*, 67 Pa. St. 233; *U. S. v. Union Pac. R. Co.*, 98 U. S. 569.

3. Such as the Diamond Match Company. See *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256. And the National Harrow Company. See *Strait v. National Harrow Co.* (Supreme Ct.), 18 N. Y. Supp. 224.

See *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, where it appears that the unlawful end was sought to be accomplished by means of unauthorized leases of corporate property. See also *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46.

4. See *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215, where it appears that the defendant corporation, without

TRADE COMBINATIONS AND CORPORATE TRUSTS.

III. LEGALITY OF TRUSTS—1. Of Co-partnership Trusts.—The co-partnership form of trust is clearly illegal.¹ A corporation has no right to become a member of a partnership, because each member of a co-partnership may bind the firm by any act of his within the scope of the partnership business,² while the affairs of a corporation must be managed and controlled by its directors and officers.³ This power cannot be delegated to such an outside party as a "trust."⁴

dealing in fuel itself, sought to control the fuel trade of St. Paul and vicinity by enforcing obedience to its by-laws by its members who were dealers in fuel.

For other examples of this class of associations, see *More v. Bennett*, 140 Ill. 69, wherein the Chicago Law Stenographers' Association was held to be an illegal combination; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, where it appears that five coal companies of *Pennsylvania* entered into an illegal combination in restraint of trade, and appointed a committee to manage the affairs of all the parties to the combination. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, and *Vulcan Powder Co. v. California Vigorit Powder Co.* (Cal. 1892), 31 Pac. Rep. 583, reveal a similar combination among powder companies. See also *Nester v. Continental Brewing Co.*, 2 Pa. Dist. Ct. Rep. 177, for a similar combination among brewers; and *Judd v. Harrington* (C. Pl.), 19 N. Y. Supp. 406, for such a combination among butchers and sheep brokers.

1. This point was expressly decided in the following cases: *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 483; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; 20 Am. & Eng. Corp. Cas. 478; *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1.

2. See *PARTNERSHIP—Powers and Rights of Partners*, vol. 17, p. 987.

3. See *OFFICERS (PRIVATE CORPORATIONS)*, vol. 17, p. 81.

So strictly has this rule been applied by the courts, that it has been held that where certain powers are by statute conferred upon the directors, such powers cannot be exercised even by the stockholders, though the directors are merely the representatives of the stockholders. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 575.

And in the recent case of *Small v.*

Minneapolis Electro-Matrix Co., 45 Minn. 264, the court, by Dickinson, J., said: "In the absence of express provisions to the contrary, it is to be considered as the law concerning business corporations that their affairs are to be managed in the interest of their stockholders, and by directors or agents appointed by them."

4. In *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 483, the court, by Finch, J., speaking of a corporation which had joined the sugar trust, said: "It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the state the gift of corporate life, only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. It has helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations. It is a violation of law for corporations to enter into a partnership. The vital characteristics of the corporations are of necessity drowned in the paramount authority of the partnership."

In *Mallory v. Hanaur Oil Works*, 86 Tenn. 602; 20 Am. & Eng. Corp. Cas. 478, the court, by Lurton, J., said: "A careful examination of this agreement discloses every material element to a contract of partnership. . . . Nothing is left to the several corporations but the right to receive a share of the profits and participate in the management and control of the consolidated interests as one of the new association. . . . The power to enter into a partnership is not expressly or impliedly conferred by our act of 1875, under which the Hanaur Oil Works is incorporated. Neither is such authority within the implied powers of cor-

TRADE COMBINATIONS AND CORPORATE TRUSTS.

porations. A partnership and a corporation are incongruous. Such a contract is wholly inconsistent with the scope and tenor of the powers expressly conferred and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation or one owing duties to the public, such as a common carrier. In a partnership, each member binds the firm, when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation. Now, if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal and each capable of binding the society by his acts."

In *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1, the court, by Minshall, J., said: "That the nature of the agreement is such as to preclude the defendant from becoming a party to it, is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships, and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have 'the affairs' of the several companies managed in a manner most conducive to the interests of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay, more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformably to the purpose for which it was created by the laws of its state. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled

and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining, and dealing in it and all its products throughout the country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our state, and void."

A contrary rule seems to prevail in *Canada*. In the case of *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant Ch. (Ont.) 540, it was held that a combination exactly like the Sugar Trust, except that it affected salt instead of sugar, was legal.

The general doctrine that corporations cannot become members of partnerships, is laid down in the following cases: *Marine Bank v. Ogden*, 29 Ill. 248; *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582; 71 Am. Dec. 681; *New York, etc., Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412.

In *Allen v. Woonsocket Co.*, 11 R. I. 288, it was held that a corporation, all of whose stock was held by one man and which had been created by special act of the legislature, which did not specify what business the corporation might carry on, might form with an individual a copartnership at will, since such a partnership may be terminated at any time at the pleasure of either party, though the court admitted that, if the partnership had been for a definite period, it might well be argued that the corporation had no right to make such a contract.

And in the case of *Butler v. American Toy Co.*, 46 Conn. 136, it was held by a divided court that, while a corporation cannot enter into a partnership unless authorized to do so by its charter, the particular corporation then before the court was impliedly authorized by the act which created it to enter into the partnership in question.

As to the power of railroad corporations to enter into traffic arrangements with one another, see *RAILROADS*, vol. 19, p. 775.

The formation of an association by several railway companies for the regulation of rates, where each company maintains its autonomy, and elects its own officers, and delegates no authority to the association to manage its

TRADE COMBINATIONS AND CORPORATE TRUSTS.

2. Of Stockholding Corporations.—A trust in the form of a stockholding corporation has also been held illegal,¹ and the American decisions are nearly unanimous to the effect that in the absence of express legislative permission, a corporation cannot purchase and hold stock in other corporations.²

routine business, is not against public policy, and such contract does not amount to a transfer of the franchises and corporate powers of the companies. *U. S. v. Trans-Missouri Freight Assoc.*, 53 Fed. Rep. 440. But the pooling of earnings is prohibited by the Interstate Commerce Act. Act of Feb. 4, 1887. And in *Hooker v. Vandewater*, 4 Den. (N. Y.) 349, it was held that an agreement by steamboat companies to pool their earnings was illegal and void.

In *England*, an association of shipowners for the purpose of regulating the proportion of the business of the association each should do, and the freights to be demanded, was not illegal, although a rebate was given to all shippers who shipped exclusively with them, and their agents were prohibited, on pain of dismissal, from acting in the interest of competing shipowners. *Mogul Steam Ship Co. v. McGregor* (1892), App. Cas. 25, affirming 23 Q. B. Div. 598.

1. *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319. In this case the court, by Magruder, J., said: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the state, but it is in contravention of the spirit, if not the letter, of the constitution. That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly, results from the very nature

of the power itself. If the privilege of purchasing and holding all the shares of the stock in all the gas companies of Chicago can be lawfully conferred upon appellee under the general incorporation act, it can be lawfully conferred upon any other corporation formed for the purpose of buying and holding all the shares of stock of said gas companies. The design of that act was, that any number of corporations might be organized to engage in the same business, if it should be deemed desirable. But the business now under consideration could hardly be exercised by two or three corporations. Suppose that, after appellee had purchased and become the holder of the majority of shares of stock of the four companies in Chicago, another corporation had been organized with the same object in view—that is to say, for the purpose of purchasing and holding a majority of the shares of the stock of the gas companies in Chicago, there being only four of such companies—what would there be for the corporation last formed to do? It could not carry out the object of its creation, because the stock it was formed to buy was already owned by an existing corporation. Hence, to grant to the appellee the privilege of purchasing and holding the capital stock of any gas company in Chicago, is to grant to it a privilege which is exclusive in its character. It is making use of the general incorporation law to secure a special privilege, immunity or franchise; it is obtaining a special charter under the cover and through the machinery of that law, for a purpose forbidden by the constitution. To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a 'lawful purpose.'

2. *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44; 26 Am. & Eng. Corp. Cas. 55; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43; 28 Am. Rep. 9; *Central R. Co. v. Collins*, 40 Ga. 582; *Franklin Bank v. Commercial Bank*, 36 Ohio St.

TRADE COMBINATIONS AND CORPORATE TRUSTS.

A different rule, however, prevails in *England*, where trading corporations are allowed to buy stock in other companies.¹

3. Of Monopolistic Trusts.—This third class of trusts is not illegal, except when it affects the production and sale of some article that is either a necessity of life or is of such general use that the public is interested in its production.² In that case such a trust is illegal for two reasons, first, because it creates a monopoly and is therefore in restraint of trade,³ and secondly, because corporations already in the field have no right to sell out or lease to it.⁴

354; 38 Am. Rep. 594; *Milbank v. New York, etc., R. Co.*, 64 How. Pr. (N. Y. Supreme Ct.) 20; *Talmage v. Pell*, 7 N. Y. 328; *Mechanics', etc., Mut. Sav. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Berry v. Yates*, 24 Barb. (N. Y.) 200; *Sumner v. Marcy*, 3 Woodb. & M. (U. S.) 105; *Hazelhurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *State v. Butler*, 86 Tenn. 614; *Buckeye Marble, etc., Co. v. Harvey*, 92 Tenn. 115; *Pierson v. McCurdy*, 33 Hun (N. Y.) 520; *New Orleans, etc., S. S. Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90. *Contra*, *Booth v. Robinson*, 55 Md. 433; *National Bank v. Texas Invest. Co.*, 74 Tex. 421; 27 Am. & Eng. Corp. Cas. 358.

1. *In re Barned's Banking Co.*, L. R., 3 Ch. 161; *In re Asiatic Banking Co.*, L. R., 4 Ch. 252.

2. The decisions do not furnish any general rule for determining what are and what are not articles of necessity, within the meaning of this rule. The following articles have been held to be of such general importance that an attempt to control their production is illegal: coal, *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston, etc., Coal Co.*, 68 N. Y. 568; 23 Am. Rep. 190; gas, *Gibbs v. Consolidated Gas Co.*, 130 U. S. 408; 25 Am. & Eng. Corp. Cas. 369; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319; *Chicago Gas-Light, etc., Co. v. People's Gas-Light, etc., Co.*, 121 Ill. 530; 16 Am. & Eng. Corp. Cas. 577; 2 Am. St. Rep. 124; matches, *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256; lumber, *Santa Clara Valley Mill, etc., Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; cotton bagging, *India Bagging Assoc. v. Kock*, 14 La. Ann. 164; butter, *Chapin v. Brown*, 83 Iowa 156; grain, *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; salt, *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Clancey v.*

Onondaga Fine Salt Co., 62 Barb. (N. Y.) 395; alcohol, *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656; candles, *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 32 Am. & Eng. Corp. Cas. 165; milk, *Chicago Milk Shippers' Assoc. v. Ford* (Ill. Circuit Ct.), 4 Nat. Corp. Rep. 300; preserves, *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; cloth, *Hilton v. Eckersley*, 6 El. & Bl. 47; grain-bags, *Pacific Factory Co. v. Adler*, 90 Cal. 110; and harrows, *Strait v. National Harrow Co.* (Supreme Ct.), 18 N. Y. Supp. 224.

The following articles do not seem to be within the rule in question: washing machines, *Dolph v. Troy Laundry Machine Co.*, 28 Fed. Rep. 553; curtain fixtures, *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; and sewing machines, *Bi-Spool Sewing Machine Co. v. Acme Mfg. Co.*, 15 Mass. 404.

3. It was for this reason that the supreme court of *Michigan* declared the *Diamond Match Company* an illegal organization. *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256. It is to be remembered, however, that this conclusion was announced in a case to which the match company was not a party. See, too, *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354; and *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215. As to the illegality of contracts in restraint of trade, see *CONTRACT*, vol. 3, p. 882.

4. *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656. See *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264; and *People v. American Sugar Ref. Co.* (Cal. Super. Ct. 1890), 7 Ry. & Corp. L. J. 83. The rule is that a corporation in whose business the public is interested has no right to transfer all its property to another corporation, in the absence of express legislative permission. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 309; *Fietsam v. Hay*, 122

TRADE COMBINATIONS AND CORPORATE TRUSTS.

These objections may also apply to trusts of the first and second classes.¹

4. **By Governing Committees.**—It is the object of this class of combinations to restrict competition in business and enhance prices by controlling the private enterprises of their members, whether corporations, co-partnerships, or individuals, by means of governing boards or committees authorized to enforce their rules and regulations by fines and forfeitures. These combinations are illegal as in restraint of trade and against public policy.²

IV. EFFECTS OF FORMING A TRUST—1. **Rights of the State.**—An illegal incorporated trust is subject to forfeiture of its charter at

Ill. 293; 22 Am. & Eng. Corp. Cas. 559; 3 Am. St. Rep. 492; Chicago Gas Light, etc., Co. v. People's Gas Light, etc., Co., 121 Ill. 530; 16 Am. & Eng. Corp. Cas. 577; 2 Am. St. Rep. 124. See CORPORATIONS, vol. 4, p. 272.

In *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656, the court, by Maxwell, J., said: "A corporation can exercise no powers except such as are granted to it by the charter under which it exists. It is no part of the powers of the distilling company to sell all its property, real and personal, together with the franchises and powers necessary to properly carry on the business. The fact that the corporation has authority to put an end to its existence by a vote of a majority of its stockholders, in which event it may proceed to settle up its affairs, dispose of its property, and divide its capital stock, and surrender its charter to the state, does not authorize it to terminate its existence by a sale and disposal of all its property and rights."

But a private manufacturing company, when public interests are not involved—that is, where a sale would not create monopoly in regard to an article of necessity—may sell all its property to another corporation. *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 404; 66 Am. Dec. 490; *Bi-Spool Sewing Machine Co. v. Acme Mfg. Co.*, 153 Mass. 404; *Ardesco Oil Co. v. North American Oil, etc., Co.*, 66 Pa. St. 375; *Holmes, etc., Mfg. Co. v. Holmes, etc., Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448.

In *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 489, a lease by one railroad company to another of its franchises and property for the purpose of creating a monopoly of the trade in anthracite coal, was held illegal and

void, and an agreement between two coal companies looking toward a monopoly was enjoined although both were corporations created under the laws of another jurisdiction. It appeared, however, that one of the coal companies was controlled by the resident railroad company, the stockholders of the latter owning and controlling the majority of the stock of the former. The court brushed aside the artificial personalities of the corporations, considering their members as the real movers in the transaction.

1. Thus, the fact that they created monopolies was given as a reason for declaring the New York Sugar Trust illegal. *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354; for dissolving the Chicago Gas Trust, *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319, and for the judgment ousting the Standard Oil Company from the exercise of a franchise not conferred upon it by its charter, *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1.

2. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; *Vulcan Powder Co. v. California Vigorit Powder Co.* (Cal. 1892), 31 Pac. Rep. 583; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Nester v. Continental Brewing Co.*, 2 Pa. Dist. Ct. Rep. 177; *Judd v. Harrington (C. Pl.)*, 19 N. Y. Supp. 406; *Moore v. Bennett*, 140 Ill. 69; *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215. In the last case, the fuel exchange, which was an incorporated body, organized for the purpose of controlling the fuel trade in St. Paul and vicinity, was enjoined from enforcing a penalty, which it might otherwise have done without the assistance of a court, as the money had been deposited as a condition precedent to membership.

TRADE COMBINATIONS AND CORPORATE TRUSTS.

the suit of the state,¹ and so are the corporations that enter into such a trust.² And the formation of an unincorporated trust may be enjoined at the suit of the state.³

2. Rights of the Dissenting Stockholders.—The formation of such a trust may be enjoined at the suit of stockholders who hold a minority of the capital stock of the corporations constituting the trust.⁴

3. Rights of the Members of the Trust.—Neither a corporation which is a member of a trust combination, nor its receiver, can recover by suit its share of the profits of the business or money due it from the trust, since such a suit would be an attempt to enforce an illegal agreement;⁵ but it may rescind the trust agreement and obtain restitution of its property, even after the agreement has been partly executed.⁶ Such corporation, however, is as to third persons, estopped from asserting the invalidity of the trust.⁷

4. Rights of the Certificate Holders.—Even though the trust is illegal, its certificates represent property, and the rights of the certificate holders to their property will be respected by the courts.⁸ Such certificates are transferable, like certificates of stock.⁹

1. *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319.

2. *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 483; *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656; *People v. American Sugar Ref. Co.* (Cal. Super. Ct. 1890), 7 Ry. & Corp. L. J. 83.

But proceedings to declare the forfeiture must be begun within the time named by the Statute of Limitations. *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1.

3. *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448; 19 Abb. N. Cas. 459. See also *State v. Standard Oil Co.*, 46 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1, wherein a corporation was ousted, by judgment of the court, from the exercise of a franchise not conferred upon it by law.

4. *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264; *Central R. Co. v. Collins*, 40 Ga. 582.

5. *Gray v. Oxnard Bros. Co.*, 59 Hun (N. Y.) 387; *Clancey v. Onondaga Fine Salt Co.*, 62 Barb. (N. Y.) 395; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46.

A court of equity will not appoint a receiver over property in litigation where the effect of such appointment

would be to assist an illegal trust in carrying out the objects of its organization. *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 721; 32 Am. & Eng. Corp. Cas. 510.

6. *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; 20 Am. & Eng. Corp. Cas. 478; and if it violates the trust agreement, a court of equity will give the trust no relief. *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; *Strait v. National Harrow Co.* (Supreme Ct.), 18 N. Y. Supp. 224. See *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 721; 32 Am. & Eng. Corp. Cas. 510.

7. *Pittsburg Carbon Co. v. McMillin*, 53 Hun (N. Y.) 67; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 479.

8. *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448.

Thus, where an unincorporated trust association has been declared illegal, the certificate holders are entitled to have the property and business placed in the hands of a receiver, *Cameron v. Havemeyer* (Supreme Ct.), 12 N. Y. Supp. 126; and the profits of the business belong to them. *Gray v. Oxnard Bros. Co.*, 59 Hun (N. Y.) 387.

9. *Cameron v. Havemeyer* (Supreme Ct.), 12 N. Y. Supp. 126; *Bean v. American L. & T. Co.*, 122 N. Y. 622. And private persons will not be en-

TRADE COMBINATIONS AND CORPORATE TRUSTS.

5. **Rights of the Trustees.**—The trustees control the trust property as legal owners and not as the agents of the certificate holders.¹ Their powers are limited by the provisions of the instrument creating the trust.²

6. **Rights of Third Persons.**—Contracts between individuals in furtherance of the objects and purposes of an illegal trust are not enforceable, being affected by the illegality of the trust contract itself.³ But the illegality of the trust combination is no defense to an action brought by one who is a creditor of the trust.⁴

V. **STATUTORY PROHIBITIONS OF TRUSTS.**—In 1890, Congress passed an act which declares illegal every contract or combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations; also every attempt to monopolize any part of such trade or commerce; and every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the territories or in the *District of Columbia*.⁵ Laws prohibiting the

joined from buying and selling these certificates on the mere ground that the trust is illegal. *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448.

It has been held that where trust certificates are expressly made transferable on the books of the trust upon condition that the holder and each transferrer shall be subject to all the provisions of the trust agreement, a court of equity will compel the trustees to transfer such a certificate on the books of the trust and issue a new one in the name of the transferee. *Rice v. Rockefeller*, 134 N. Y. 174, reversing 56 Hun (N. Y.) 516.

1. *Smith v. Anderson*, 15 Ch. Div. 247.

2. Thus, where the trust agreement gives the trustees power to acquire, hold and dispose of the title to the shares of stock, which form the subject of the trust, they may sell such stock to third persons. *Gould v. Head*, 41 Fed. Rep. 240. But where the trust agreement merely provides that the shares of stock shall be transferred to the trustees, to be held by them and their successors for the purposes set out in the trust agreement, the trustees have no right to sell or pledge such shares of stock. *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354.

3. *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256; *Chapin v. Brown*, 83 Iowa 156. But see *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464.

4. *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 479.

The receiver of a trust, since he repre-

sents its creditors as well as its certificate holders, may sue to recover debts due to the trust. *Pittsburg Carbon Co. v. McMillin*, 53 Hun (N. Y.) 67; 119 N. Y. 46.

5. 26 U. S. St. at Large, p. 209, ch. 647. The act also imposes a punishment by fine and imprisonment for any violation of its provisions, and declares that property in transit under a contract forbidden by the act shall be forfeited. It also authorizes any person injured in his property or business by any violation of the act to sue and recover treble damages therefor.

In *U. S. v. Jellico Mountain Coal, etc., Co.*, 46 Fed. Rep. 432, the court refused to declare this act unconstitutional, and held that an agreement between coal mining companies operating chiefly in *Kentucky*, and coal dealers doing business in *Tennessee*, creating a coal exchange to advance the interests of the coal trade and to fix the price of coal, and forbidding its members to buy coal from or sell coal to any coal dealers or miners who were not members of the exchange, constituted a violation of said act.

In *Bishop v. American Preservers' Co.*, 51 Fed. Rep. 272, it was held that this statute did not give a member of a trust a right to sue the trust for damages suffered by him through suits brought against him by the trust, where it was not shown whether or not the trust had a right to bring the suits, since the trust, although an illegal organization, might have a right to sue.

Under this act, it must be alleged in

formation of trusts have also been recently enacted by several of the states.¹

TRADE FIXTURES.—(See **FIXTURES**, vol. 8, p. 61.)

the indictment that the defendant monopolized or conspired to monopolize. It is not sufficient to allege the doing of certain acts with the intent to monopolize. *U. S. v. Greenhut*, 50 Fed. Rep. 469.

It is not sufficient to follow simply the language of the statute, as it does not fully, directly, and clearly set forth all the elements necessary to constitute the offense. *In re Greene*, 52 Fed. Rep. 104.

1. The *Nebraska* Act, approved March 20th, 1889, declares it unlawful for any person, partnership, company, association, or corporation to enter into any contract or combination whereby a common price shall be fixed for any article or product, or whereby the manufacture or sale thereof shall be limited or interfered with, or whereby the profits of the manufacture or sale of any product shall be made a common fund to be divided among the parties to the combination. *Nebraska* Sess. Laws (1889), p. 516.

The *New York* Act, approved June 7th, 1890, declares that no stock corporation shall combine with any other corporation for the prevention of competition. *New York* Sess. Laws (1890), p. 1069.

The *Illinois* Act, approved June 11th, 1891, declares that any corporation, partnership or individual which shall create or enter into any pool, trust, agreement, combination, confederation, or understanding to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, shall be adjudged guilty of conspiracy to defraud. It also forbids corporations issuing or owning trust certificates or entering into any trust agreement. *Illinois* Sess. Laws (1891), p. 206.

Under this act, it has been held by the circuit court of Cook county, *Illinois*, that a corporation whose stockholders were all either producers or shippers of milk, whose by-laws provided that shares of its stock could not be transferred to any one who was not, or did not expect soon to become, a producer or shipper of milk, and whose business was to receive milk from its stockholders, sell the same for them

and fix the price at which it should be sold, was an illegal combination. *Chicago Milk Shippers' Assoc. v. Ford*, 4 Nat. Corp. Rep. 300.

The *Kansas* Act, approved March 2d, 1891, prohibits combinations to prevent competition among persons engaged in buying or selling live stock. *Kansas* Sess. Laws (1891), p. 294, ch. 158.

The *Louisiana* Act, approved July 5th, 1890, declares illegal all contracts, trust combinations or conspiracies in restraint of trade or commerce, and makes it a misdemeanor to monopolize, or attempt to monopolize, or combine or conspire to monopolize, any part of the trade or commerce within the state. *Louisiana* Acts (1890), p. 90, No. 86.

It has been held that this statute requires, for the complete commission of the offense thereby created, no ulterior motive, such as an intent to defraud, and that to compass any of the acts mentioned in the statute by any means and with no other motive than to compass them, constitutes a violation of the statute. *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 721; 32 Am. & Eng. Corp. Cas. 510. It was also held in the same case that the creation of a corporation which had secured the control and pooled the business of thirty-five of the leading bakeries in twelve different states of the west and south, and which was evidently seeking to control still other bakeries, constituted an attempt to monopolize trade.

The *South Dakota* Act, approved March 7th, 1890, makes criminal all trusts and combinations tending to prevent a free, fair and full competition in the production, manufacture or sale of any article of domestic growth, use or manufacture, or to advance the price thereof beyond the reasonable cost of production. *South Dakota* Laws (1890), p. 323, ch. 154.

The *Iowa* Act, approved May 6th, 1890, makes it a misdemeanor for any corporation, partnership, individual or association to become a party to any trust or agreement to regulate the price of any article or merchandise, or to issue or own trust certificates, or to become a member of any combination to limit or fix the price or lessen the production of

TRADE-MARKS.

- I. Definition, 241.
- II. History, 245.
- III. What May Constitute a Trade-Mark, 245.
 1. *Arbitrary Words*, 245.
 2. *Fictitious Names*, 248.
 3. *Devices or Symbols*, 249.
 4. *Numerals*, 255.
 5. *Letters*, 259.
 6. *Name of Inventor or Maker*, 260.
 - a. *In General*, 260.
 - b. *Persons of the Same Name*, 262.
 - c. *Fraudulent Use of a Competitor's Name*, 265.
 - d. *Agreement by One Person to Permit Another to Use His Name*, 267.
 - e. *Corporation Names*, 268.
 7. *Names of Publications*, 269.
 8. *Trade Name as Applied to Business Stand; Signs*, 276.
 9. *Suggestive Names*, 282.
 10. *Collocation of Words*, 282.
 11. *Statements True by Claimant and Untrue by All Others*, 288.
- IV. What May not Be a Valid Trade-Mark, 289.
 1. *Descriptive Words and Marks*, 289.
 - a. *Quality and Character*, 289.
 - b. *Peculiar Excellence*, 291.
 - c. *Grade*, 292.
 - d. *Words Indicating a Process of Manufacture*, 295.
 - e. *Purpose or Use*, 300.
 - f. *Ingredients of Medicines*, 301.
 - g. *Generic Names*, 302.
 - h. *Exceptions*, 305.
 2. *Color*, 306.
 3. *Form of Article or Package*, 311.
 4. *Articles Attached to Manufactured Products*, 315.
 5. *Name of Patented Article After Expiration of Patent*, 316.
 6. *Words and Marks in Prior Use*, 324.
 7. *Geographical Terms*, 327.
 - a. *General Rule in the United States*, 327.
 - b. *The English Rule*, 331.
 - c. *Rights of Residents Against Non-residents in a Geographical Term*, 334.
 - d. *Geographical Word not Used in a Geographical Sense*, 335.
 - e. *Names of Mineral Springs*, 335.
 8. *Utility of Distinguishing Mark*, 339.
- V. Doctrine of Origin and Ownership, 340.
 1. *In General*, 340.
 2. *Acquisition of Title—Instant and Immediate Acquisition—Period of Use—Exclusive Ownership*, 345.
 3. *Class of Merchandise*, 351.
 4. *Affixation*, 358.
 5. *Who May Acquire a Trade-Mark*, 361.
- VI. Registration of Trade-Marks Under United States Statutes, 363.

any article of commerce. *Iowa Acts* (1890), p. 41, ch. 28.

Statutes prohibiting pools, trusts or combinations to regulate or control prices, have also been enacted in other states. See *Alabama Acts* (1890-91), p. 438, ch. 202; *Missouri Laws* (1889), p. 97, and *Missouri Laws* (1891), p. 186; *New Mexico Laws* (1891), p. 27, ch. 10, and *Tennessee Acts* (1891), p. 428, ch. 218; *California Stat.* (1893), ch. 19, § 4; *Kentucky Acts* (1890), ch. 1621; *Maine Laws* (1889), ch. 266, § 1; *Michigan Acts* (1889), ch. 225; *Minnesota Laws* (1891), ch. 10; *Mississippi Laws* (1890), ch. 36, § 1; *North Carolina Laws* (1889), ch. 374.

The *Missouri* "anti-trust act" of 1889 required the officers of corpora-

tions to inform the secretary of state, under oath, whether their corporations had violated the provisions of said act. In the case of *State v. Simmons Hardware Co.*, 109 Mo. 118, it was held that this provision of the act was unconstitutional, as being in conflict with the declaration of the *Missouri* constitution that "No person shall be compelled to testify against himself in a criminal case," since the act pronounced a penalty against the officers of any corporation that violated the act.

Authorities.—Cook on Trusts; Spelling on Trusts and Monopolies. The Railway and Corporation Law Journal, vol. 7, p. 236, gives a list of magazines and newspaper articles on the subject of trust combinations.

1. *In General*, 363.
2. *Interference*, 365.
3. *Effect Upon Common-Law Rights*, 366.
4. *Importation of Foreign Goods Bearing Domestic Trade-Mark*, 367.
5. *State Statutes*, 368.
6. *Treaties with Foreign Nations; International Convention*, 369.
- VII. *Assignment and Transfer*, 371.
 1. *General Rule*, 371.
 2. *Trade-Mark not Assignable Apart from Business or Article*, 381.
 3. *Assignment, What Constitutes*, 384.
 - a. *In General*, 384.
 - b. *Act of Parties*, 385.
 - c. *Operation of Law*, 387.
 4. *Assignment for Benefit of Creditors*, 394.
 5. *Succession by Inheritance*, 397. [397.
 6. *License to Use Trade-Mark*, 398.
- VIII. *Partnerships*, 398.
 1. *Trade-Mark of Individual Entering Firm; Rights of Firm Therein*, 398.
 2. *Rights of Members of a Firm in the Trade-Marks of the Partnership*, 399.
 3. *Rights of Retiring Partner*, 399.
 4. *Rights of Partners Buying Others Out; Rights of Purchaser in Name of Retiring Partner*, 401.
 5. *Rights of Partners on Dissolution Dependent Upon Nature of Trade-Mark; Rule as to Technical Trade-Marks; Rule as to Name of Partner or Partners*, 402.
 6. *Rights of Creditors in Trade-Marks of Firm*, 404.
 7. *Rights of Surviving Partners in Firm Trade-Marks and Name of Deceased*, 405.
- IX. *Laches and Abandonment*, 407.
 1. *Laches*, 407.
 2. *Abandonment*, 412.
- X. *Infringement*, 414.
 1. *In General*, 414.
 2. *Imitation of Name*, 414.
 3. *Imitation of Label*, 422.
 4. *Imitation of Package*, 426.
 5. *Imitation of Essential Feature*, 429.
 6. *Unlawful Competition—Deception of Public by Retailer—Dress of Goods*, 433.
 7. *Sale of Goods Under Another Person's Wrappers and Labels, or in Stamped Bottles*, 442.
 8. *Sale of Inferior for Superior Goods of the Same Manufacturer*, 443.
 9. *Intention to Defraud*, 444.
 10. *Marks Used on Other Kinds of Goods than Those of Complainant*, 446.
 11. *Similitude; Duty of Competitor*, 447.
 12. *Damnum Absque Injuria*, 449.
 13. *Deception Impossible*, 451.
- XI. *Effect of Plaintiff's Misrepresentations to the Public*, 456.
 1. *In General*, 456.
 2. *Misrepresentation as to Ingredients*, 458.
 3. *As to Cures*, 460.
 4. *As to Origin or Place of Manufacture*, 462.
 5. *As to the Maker (Assignee)*, 464.
 6. *Wrongful Use of the Word "Patent,"* 468.
 7. *Cases in Which Complainant's Rights Were Sustained Notwithstanding Apparent Deception; Purging Falsehood*, 472.
- XII. *Procedure*, 477.
 1. *Jurisdiction*, 477.
 - a. *Of Law and Equity*, 477.
 - b. *Of United States Courts*, 479.
 - c. *Of State Courts*, 481.
 - d. *Criminal Remedy*, 482.
 2. *Parties*, 484.
 - a. *Aliens (as Plaintiffs)*, 484.
 - b. *Vendors (as Defendants)*, 487.
 - c. *Printers of Labels and Marks (as Defendants)*, 488.
 - d. *Members of Unincorporated Associations (as Plaintiffs)*, 489.
 - e. *Public Officers*, 492.
 - f. *Persons Indirectly Connected with Trade-Mark Infringement*, 493.
 3. *Evidence*, 494.
 - a. *Expert Testimony*, 494.
 - b. *Discovery*, 497.
 4. *Demurrer*, 498.
 5. *Preliminary Injunction*, 500.
 6. *Decree and Permanent Injunction*, 505.
 7. *Damages and Profits*, 512.
 8. *Costs*, 520.
 9. *Appeal*, 523.

I. DEFINITION.—A trade-mark is a name, sign, symbol, or device employed by a person, firm, or corporation for the purpose of indicating to their customers, that the goods upon which the name or mark appears are made or sold by him, them, or it, or to indicate the business he, they, or it conducts, or the place where said business is carried on.

A manufacturer or publisher may adopt a trade-mark to indicate the origin, ownership, character, and quality of the goods or publications which he makes or issues.

A merchant also may adopt a trade-mark to denote his skill in the selection of the goods that he sells, and to give to them his guarantee of their character and quality.

And a business house, hotel, or theater may adopt a trade-mark name, to indicate its location and identity.

A public carrier, whether person, firm, or corporation, may adopt a trade-mark to indicate its identity, and to guide its patrons in dealing with it.¹

1. Slater on Trade-Marks 232.

"A trade-mark, properly so called, may be described as a particular mark or symbol, used by a person for the purpose of denoting that the article to which it is affixed is sold or manufactured by him or by his authority, or that he carries on business at a particular place." Lord Cranworth in *Leather Cloth Co. v. American Leather Cloth Co.*, 35 L. J. Ch. 61. See also Kerr on Injunctions, p. 356.

In *Shaw Stocking Co. v. Mack*, 101 P. & S.; 12 Fed. Rep. 707, Coxe, J., said: "Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. Its object is twofold: First, to protect the party using it from competition with inferior articles; and second, to protect the public from imposition. There is hardly a limit to the devices that may be thus employed; the whole material universe is open to the enterprising merchant or manufacturer. Anything which can serve to distinguish one man's productions from those of another may be used. The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic. The trade-mark may consist of a token, letter, sign, or seal. Names, ciphers, monograms, pictures, and figures may be used. Why not numerals united? What consistency is there in allowing it in a combination of letters, but denying it in a combination of figures?"

In *Thornton v. Crowley*, 76 P. & S.; 47 N. Y. Super. Ct. 527, Freeman, J.,

said: "The court, upon proof of infringement, will liberally protect him, not because he has any property in the word or words, or the combination, but upon the principle that defendant's imitation constitutes a fraud upon one who has established a trade and a reputation. Plaintiff's prior and exclusive right to the use having been established, the test is whether the imitation is calculated to deceive purchasers. Upon the question of tendency to deceive, it may not be necessary to show that a person giving ordinary attention, or any attention, is likely to be misled. Perhaps it is sufficient that the careless and unwary may be misled. Upon this point the authorities are not uniform. But before the court can be called upon to apply any test at all, plaintiff's prior and exclusive right must be clearly established." In *Skinner v. Oakes*, 77 P. & S.; 10 Mo. App. 45, Thompson, J., used the following language: "The courts have proceeded upon the twofold principle, that the public have a right to know that goods which bear the signature or mark of a particular manufacturer or vendor are in fact the goods of such manufacturer or vendor, and that the manufacturer or vendor of such goods has a right to any advantage which may accrue to him from the public knowing that fact." Congress, etc., *Spring Co. v. Rock Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82; Glen, etc., *Mfg. Co. v. Hall*, 61 N. Y. 229; 19 Am. Rep. 278. See *Ex p. Frieberg*, 87 P. & S.; 20 Pat. Off. Gaz. 1164, in

Definition.

TRADE-MARKS.

Definition.

which Marble, Commissioner, said: "A trade-mark is an arbitrary character or characters without special meaning, adopted by persons, firms, or corporations, for the purpose of identifying the goods manufactured by them or of which they have the sale."

In *Marshall v. Pinkham*, 82 P. & S.; 52 Wis. 572; 38 Am. Rep. 756, Cassoday, J., gave as part of the opinion: "It seems to be the office of a trade-mark to point out the true source, origin or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. Such is substantially the rule laid down by many authorities." *Dunbar v. Glenn*, 42 Wis. 118; 24 Am. Rep. 395; *Gillott v. Esterbrook*, 48 N. Y. 374; 8 Am. Rep. 553; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Fetridge v. Wells*, 13 How. Pr. (N. Y. Super. Ct.) 385; *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452; *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270.

In *Insurance Oil Tank Co. v. Scott*, 79 P. & S.; 33 La. Ann. 946; 39 Am. Rep. 286, Fenner, J., said: "The sole question involved is plaintiff's right to protection in the exclusive use of its trade-mark. A corporation is entitled to have its trade-mark as well as a private individual, and may sue for its infringement."

In *Larrabee v. Lewis*, 89 P. & S; 67 Ga. 562; 44 Am. Rep. 735, Crawford, J., said: "A trade-mark is defined to be the name, symbol, figure, letter, form, or device, used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result from a reputation for superior skill, industry or enterprise. Upton's Law of Trade-Marks 99. The trade-mark must designate and distinguish the owner's production from the general manufacture of the same article, and cannot consist of a word belonging to the general public describing truly a known product."

In *Potter v. McPherson*, 62 P. & S.; 21 Hun (N. Y.) 559, Daniels, J., speaking upon the subject, said: "Upon that subject, the law protects manufacturers and dealers in the use of words, phrases, or other devices employed by them to

distinguish their commodities from those of other dealers, when they are such as to indicate the origin or ownership of the article to which they are applied. *Farina v. Silverlock*, 39 Eng. L. & Eq. 514, where the exclusive right to use the term 'Eau de Cologne' was maintained; *Seixo v. Provezende*, L. R., 1 Ch. App. 192; *Colman v. Crump*, 70 N. Y. 573, where the use of a device of a bull's head was sustained as a trade-mark; *McLean v. Fleming*, 96 U. S. 245, which held the right to use the name of 'Dr. McLean's Liver Pills' to be one which should be protected; *Newman v. Alvord*, 49 Barb. (N. Y.) 588. The principle sustained by these and other cases has been so far extended as to include other devices adopted for the purpose of distinguishing one person's business and the commodities in which he may deal, from those of others. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278. And it has also been applied to the protection of the rights of the publisher in the title to newspapers, books and pamphlets. In *Bell v. Locke*, 8 Paige (N. Y.) 75; 34 Am. Dec. 371, its application to the publication of a competing newspaper was considered, and the injunction denied only because the title of the defendant's paper was so clearly distinguishable from that of the plaintiff as not to be calculated to mislead or deceive the public. A similar point was considered in the case of *Clement v. Maddick*, 1 Giff. 98, where the defendant was prevented, by means of an injunction, from selling a publication bearing substantially the same title as one made by the plaintiff. In *Mack v. Petter*, L. R., 14 Eq. 431, the same principle also was applied. There the title of the plaintiff's book was that of 'Birthday Scriptural Text Books,' while the defendant published his work under the title of 'Children's Birthday Text Books,' and the latter was held to be so clearly an appropriation of the title previously applied to the publication of the plaintiff's work, as to be the proper subject of restraint, by means of an injunction. The same point was considered in *Bradbury v. Dickens*, 27 Beav. 53, where it was held that the title of 'Household Words' given to a magazine was property, and for that reason the subject of a sale, under an order of the court of chancery."

In *Hegeman v. Hegeman*, 53 P. & S.; 8 Daly (N. Y.) 1, Daly, C. J., said:

"A trade-mark may consist in a name, or in a symbol or device used to indicate the nature, quality or identity of an article of commerce, whether it consists of an article that anyone is at liberty to fabricate, compound or vend, or which originated with, or the exclusive right to manufacture or vend which is under the protection of a patent, or otherwise in the person or proprietor by whom the trade-mark was devised. It may exist where the name of the article and of the proprietor are so blended together that the right to the use of the name is indispensable to the use of the trade-mark, or may consist of the name alone of the manufacturer or proprietor, or may exist where the article fabricated is so made or shaped that the peculiar form of it is designed to, and does, serve as a trade-mark, as in the case of a sewing machine, the iron framework of which was so constructed as to represent and form the two initial letters of the proprietor's name." See *Shaver v. Shaver*, 65 P. & S.; 54 Iowa 208; 37 Am. Rep. 194, where Beck, J., said: "A trade-mark is a name, sign, symbol, mark, brand, or device of any kind, used to designate the goods manufactured or sold, or the place of business of the manufacturer or dealer in such goods."

In *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589; 73 P. & S., Rapallo, J., said: "Trade-marks are of two kinds. They may consist of pictures or symbols, or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in."

In *Royal Baking Powder Co. v. Jenkins*, 50 P. & S. (1880), Daniels, J., in the special term of the *New York* supreme court, delivered the opinion of the court, saying: "Independently of any statutory law, and under well-settled principles of common law, persons engaged in the manufacture of articles of trade have the right to distinguish them by artificial devices from all other similar articles manufactured and sold. And when that has been done and a business created for such articles as so distinguished, no other person or persons are at liberty to either adopt that device or one so closely resembling it as to deceive persons dealing in the same class of articles,

and thereby induce the conviction that, in purchasing the simulated articles, they are in fact purchasing those of the first manufacturer and dealer; in other words, one person has no right, by simulating the trade devices of another, to take away his customers, or undermine his business. While the law justifies and encourages manly competition, it will not tolerate, but, on the other hand, will restrain and prevent, the use of artifices by which dealers may be deprived of well-earned advantages lawfully secured by fair dealing and honest trading. These principles appear to be now settled, both in *England* and the *United States*, and they are well sustained by authority." *Congress, etc.*, *Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82; *Colman v. Crump*, 70 N. Y. 573; *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22; *Devlin v. Devlin*, 69 N. Y. 212; 25 Am. Rep. 173.

In *Godillot v. Hazard*, 24 P. & S.; 44 N. Y. Super. Ct. 427, Monell, C. J., said: "A trade-mark may consist of anything, marks, forms, symbols, which designate the true origin or ownership of the article. It cannot consist of anything which merely denotes the name or quality."

In *Amoskeag Mfg. Co. v. Trainer*, 39 P. & S.; 101 U. S. 51, Clifford, J., said: "Words or devices, or even a name, in certain cases, may be adopted as a trade-mark which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale. Stamps or trade-marks of the kind are employed to point to the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or to give notice to the public who is the producer, or where it may be purchased. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322." And again in the same case, the same judge said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture, of a symbol or device not in actual use, to designate articles of the same kind or class." In the same case, Field, J., said. "Everyone is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which

Definition.

TRADE-MARKS.

Definition.

will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. In this way it often proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the courts will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation, or by restraining others from applying it to their goods and compelling them to account for profits made on a sale of goods marked with it."

In *Godillot v. Hazard*, 24 P. & S.; 44 N. Y. Super. Ct. 427, Monell, C. J., said: "It has now come to be well settled, that the adoption of any words or device not already in use, and not denoting the name or quality of the article, will constitute a trade-mark; and they so far become property that the courts will protect the owner against any usurpation or interference; and for the well-grounded reason that a person who, by his skill and industry, has acquired a good reputation for the commodity he manufactures or sells, ought to be allowed to reap the fruits of it." And see *Williams v. Johnson*, 2 Bosw. (N. Y.) 1. See also *Leidersdorf v. Flint*, 20 P. & S.; 8 Biss. (U. S.) 327, where Dyer, J., said: "A trade-mark has been very well defined as one's commercial signature to his goods. It may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, so that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity." (*McLean v. Fleming*, 96 U. S. 245; *Upton's Law of Trade-Marks*, 9; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 604; 42 Am. Dec. 114; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281). . . . But the court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business, and that, having appropriated to

himself a particular label, or sign, or trade-mark, indicating that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who pirates upon the good-will of his customers or of the patrons of his trade or business, by sailing under his flag without his authority or consent." See also *Hall v. Barrows*, 4 De G. J. & S. 158; *Schneider v. Williams*, 44 Pat. Off. Gaz. 1400; *McAndrews v. Bassett*, 4 De G. J. & S. 386; *Maxwell v. Hogg*, L. R., 2 Ch. App. 314; *Lawson v. Bank of London*, 18 C. B. 84.

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Within a month subsequent to the death of the senior partner of the firm, his executors sold and conveyed all the interest of the decedent in the business to the surviving partner and complainant, whereby they, under the firm name of 'Fleming Brothers,' acquired not only the title to the receipt and the right to make the pills, but also the right to use the labels and trade-marks used by the former owners. Possessed of the whole interest, they (the firm, Fleming Brothers) prosecuted the business, with some changes in the individual partners, until July 1st, 1865, when the present complainant sold out his whole interest to his brother, John Fleming, who, as sole proprietor of what the firm owned, continued the business until the 2d of November, 1870, when he died, leaving a last will and testament. . . . In such cases, the question is not whether the complainant was the original inventor or proprietor of the article made by him, and on which he puts his trade-mark, nor whether the article made and sold under his trade-mark by the respondent is equal to his own in value or quality; but the court proceeds on the ground that the complainant has a valuable interest in the good-will of his trade or business, and, having adopted a particular label, sign, or trade-mark, indicating to his customers that the article bearing it is made or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers by using such labels, signs, or trade-mark without his knowledge or consent. *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281. Everywhere, courts of justice pro-

II. HISTORY.—The law of trade-marks is of recent growth. One hundred and fifty years ago it may be said to have been non-existent, but to-day it is defined and elaborated by statute and judicial decision.¹

III. WHAT MAY CONSTITUTE A TRADE-MARK—1. **Arbitrary Words.**—A trade-mark may consist of a word which is arbitrary in its selection and meaning; which does not, by its usual meaning, necessarily denote the character, quality, materials, or grade of the goods on which it is used, but by application to a class of

ceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority. Decided cases to that effect are quite numerous, and it is doubtless correct to say that a person may have a right in his own name as a trade-mark as against a trader or dealer of a different name; but the better opinion is, that such a party is not, in general, entitled to the exclusive use of a name, merely as such, without more. *Millington v. Fox*, 3 Myl. & C. 338; *Dent v. Turpin*, 2 J. & H. 139; *Meneely v. Meneely*, 62 N. Y. 427; 20 Am. Rep. 489. . . . Such a proprietor, if he owns or controls the goods which he exposes to sale, is entitled to the exclusive use of any trade-mark adopted and applied, by him to the goods, to distinguish them as being of a particular manufacture and quality, even though he is not the manufacturer, and the name of the real manufacturer is used as part of the device. *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Emerson v. Badger*, 101 Mass. 82."

1. In *Blanchard v. Hill*, 2 Atk. 484, *Hardwicke, L.C.*, said: "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it."

Since the cases of *Singleton v. Bolton*, 3 Doug. 393, decided by Lord Mansfield (1783), and *Hogg v. Kirby*, 8 Ves. 215, decided by Lord Eldon (1803), in which the fundamental principle of the right of a trader to protection in the exclusive use of his trade-

marks was laid down, more than two thousand cases have been decided by the courts of *England* and the *United States*, out of which have grown, without the aid of statute, an elaborate system of law, covering multitudinous questions and establishing principles and rules of law suited to almost every form of piracy which the ingenuity of man can devise.

The trade-mark statutes of the *United States* are of recent origin and limited scope. The first act was passed July 8th, 1870, and provided for the registration of trade-marks in the *United States* Patent Office, and made the registration *prima facie* evidence of ownership. This statute was amended in some minor particulars in 1871, *United States Rev. Stat.*, § 2486. In 1876, an act was passed creating a criminal remedy for the infringement of trade-marks. In 1879, the Supreme Court of the *United States*, in *U. S. v. Stiffens*, 100 U. S. 82, held the act of 1870 unconstitutional and void. It did not decide directly that the act of 1876 was also void, but the circuit court for the District of *Missouri*, in *U. S. v. Koch*, 40 Fed. Rep. 250, held that the act of 1876 fell with the act of 1870. March 3d, 1881, Congress passed what is now the trade-mark statute of the *United States*. It provides for the registration of trade-marks by citizens and aliens, provided the trade-mark offered for registration has been used in commerce with a foreign nation or an Indian tribe.

All common-law rights of a trade-mark owner are expressly reserved by the statute. *United States Rev. Stat.*, § 4946.

In *England*, a trade-mark registration statute was passed in 1875, and it has been amended from time to time in 1887 and 1891. The English law is much more comprehensive and thorough than that of the *United States*. All trade-marks are required to be registered, which gives to the registry a

merchandise may indicate their ownership and origin, and carry with it a guarantee of character and quality.¹

conclusiveness much greater than ours, and after five years' use under registration, the registry is conclusive evidence of title. Merchandise Marks, Act 23d, Aug. 1887, 50 & 51 Vict., ch. 28; Merchandise Marks, Act 1891, May 11th, 54 Vict., ch. 15.

1. The phrase "Syrup of Figs," adopted by the manufacturer to designate a medical preparation, composed in part of fig syrup, and which, during a course of trade, has become known to the public by such name, indicates the origin of the preparation, rather than its quality or nature, and constitutes a valid trade-mark. *Beatty, J.*, said: "The phrase 'Syrup of Figs' is in no sense a generic one. It is not a name of a natural product, or of a class of natural products. If such an article exists, it must be the result of a manufacturing process. So far as we are advised, the name never existed, nor was it applied to any natural or artificial product, until formulated by appellee of words of no prior association, and by it used to designate its preparation. Even if such medicine were made entirely of figs, it is still a new name, applied to a manufactured, and not a natural product; hence, indicates rather its origin, than its quality, or even its nature." *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. Rep. 175.

The word "Star," and the symbol of a star, adopted and used during many years by manufacturers of shirts, waists, underwear, and furnishing goods, to mark and designate their goods, in combination with the words "Star Shirts," and other words describing the articles, so that the goods became well known by such mark, and by the designation of "Star Goods," constitute a valid trade-mark. *Hutchinson v. Blumberg*, 51 Fed. Rep. 829.

The words "Nickel In," used to designate a brand of cigars, being original, arbitrary, and fanciful, and not descriptive of the articles, their grades or quality, are entitled to the protection given to trade-marks. *Schendel v. Silver*, 63 Hun (N. Y.) 330.

In *Waterman v. Shipman*, 130 N. Y. 301, the court held that the word "Ideal," as applied to fountain pens, was not generic or descriptive of the article, its qualities, ingredients, grade,

or characteristics, but was an arbitrary or fanciful name, and therefore a valid trade-mark.

The word "Celluloid," being a new and arbitrary word coined by plaintiff, and applied to goods of its manufacture, is a valid trade-mark, in the use of which, plaintiff is entitled to be protected, though the term has become so generally known as to have been adopted by the public as the common appellative of the article to which it is applied. *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712.

While the words "Warren Hose Supporter," when used alone, may not constitute a valid trade-mark, yet when used in connection with the cut of a hose supporter engaged with a stocking, and placed, as labels, on boxes containing hose supporters, they are sufficiently arbitrary to fairly denote the origin of the goods, and are entitled to protection as a trade-mark. *Frost v. Rindskopf*, 42 Fed. Rep. 408.

A label consisting of the head of an elk, with the word "Elk" printed in large letters upon the face of the label, sufficiently indicates origin and ownership, to be a valid trade-mark, when applied to a box of cigars. *Lichenstein v. Goldsmith*, 37 Fed. Rep. 359.

The word "Valvaline," compounded and used on packages of lubricating oils, by plaintiffs, is a valid trade-mark. *Leonard v. White's Golden Lubricator Co.*, 38 Fed. Rep. 922.

The words "Cough Cherries," as applied to a confection, are not descriptive of the qualities of the article, but are sufficiently arbitrary and fanciful to be appropriated as a trade-mark. *Stoughton v. Woodward*, 39 Fed. Rep. 902.

A combination of words ("La Favorita" Flour), made by a firm engaged in mercantile business, from a foreign language, in order to designate merchandise selected by them in the exercise of their best judgment as being a certain standard and of uniformity of quality, may be protected to them and for their use as a trade-mark. *Holt v. Menendez*, 128 U. S. 514; also *Holt v. Menendez*, 23 Fed. Rep. 869.

Where a word, as "Celluloid," is coined and used as a trade-mark, and stamped on articles manufactured from a certain substance, the fact that such

word subsequently becomes the common appellative of such substance cannot impair the rights acquired in the word, and while others can use it to designate the product, they cannot apply it in any way as a trade-mark. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94.

Arbitrary terms, such as "Tin Tag," or "Wood Tag," branded upon or given to goods by the manufacturer or seller, to distinguish them, may constitute valid trade-marks, but the person so using them would have no right to the exclusive use of tin or wood as a material to designate the goods. *Lorillard v. Pride*, 28 Fed. Rep. 434.

In *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169, *Rapallo, J.*, after reviewing many cases on the subject, concludes as follows: "Our conclusion is, that where a manufacturer has invented a new name (as 'Sliced Animals,' 'Sliced Birds,' 'Sliced Objects'), consisting either of a new word, or a word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article." This leading case has been approved in *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, in the opinion by Mr. Justice Bradley, and also in *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712, in the opinion by Mr. Justice Shipman.

In *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369, the court held that the word "Electro-Silicon" was a valid trade-mark. *Brady, J.*, said: "It conclusively appears that neither the words in combination nor singly employed, describe the article which they are intended to designate. It is a substance for polishing, composed of infusorial earth, the proper description of which is not silicon, which exists in small quantities and is not an article of commerce. The words, therefore, are arbitrary and coined for the purpose of distinguishing an article which the plaintiff's predecessor first introduced

into the commerce of the nation of which it has become a part." To the same effect are *Electro-Silicon Co. v. Levy*, 59 How. Pr. (N. Y. Supreme Ct.) 469; *Electro-Silicon Co. v. Trask*, 59 How. Pr. (N. Y. Supreme Ct.) 189; *Lauferty v. Wheeler*, 63 How. Pr. (N. Y. C. Pl.) 488 ("*Alderney Mfg. Co.*," sustained for oleomargarine).

"Magnetic Balm," being a medicine which does not contain any magnetism or electricity, but an arbitrarily selected word, not expressive of the quality or character of the article, is a valid trade-mark. *Smith v. Sixbury*, 25 Hun (N. Y.) 232.

The word "Snow-Flake," as applied to bread or crackers, is not an arbitrary word, but is a mere description of whiteness, lightness, and purity, and cannot be a valid trade-mark. *Larrabee v. Lewis*, 67 Ga. 561; 44 Am. Rep. 735.

The use of the word "Hoosier," as applied to grain drills, to designate manufactured goods and to distinguish them from other drills, is a valid trade-mark. *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

In *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589, the court held that the word "Pride," as applied to cigars, was an arbitrary word, and not descriptive of the article, and could lawfully be appropriated as a trade-mark.

In *Sheppard v. Stuart*, 13 Phila. (Pa.) 117, "Excelsior," as applied to stoves, was held to be a valid trade-mark, as being an arbitrary word, and indicating the true origin and ownership of the article.

In *Roberts v. Sheldon*, 8 Biss. (U. S.) 398, *Blodge, W. J.*, said: "The word 'Parabola,' it seems to me is, as stated by the complainant, an arbitrary term adopted by him to distinguish his needles from those of other manufacturers, and he had a right to so select and apply it."

In *Williams v. Adams*, 8 Biss. (U. S.), it was held that the word "Yankee," as applied to shaving soap, was a valid trade-mark.

"Sapolio," on a scouring soap, is a valid trade-mark. *Enoch Morgan's Son's Co. v. Schwachhofer*, 55 How. Pr. (N. Y. Supreme Ct.) 37.

In *Ford v. Foster*, L. R., 7 Ch. App. 611, the word "Eureka" as applied to shirts, was held to be a valid trade-mark.

In *Hirst v. Denham*, L. R., 14 Eq. Cas. 542, the plaintiff applied for an injunction to restrain the defendants from

2. Fictitious Names.—A trade-mark may consist of a fictitious

selling, etc., cloth under the names of "Turin," "Sefton," "Leopold," or "Liverpool," and from using the said names for the purpose of describing any cloths sold by them. In granting the injunction, Sir James Bacon, V. C., said: "When a manufacturer has produced an article of merchandise, calling it by a particular name and vending it with a particular mark, he has acquired an exclusive right to the use of such name and mark, which becomes what is usually called his trade-mark, and is entitled to prevent all other persons from using such name and mark to denote articles of a similar kind and appearance."

The word "Eureka," first used by complainants in a compounded fertilizer which they called the "Eureka Ammoniated Bone Superphosphate of Lime," and have used for several years, is a trade-mark, in the exclusive use of which they have the right to be protected by the courts. Giles, J., said: "The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark." *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115.

In *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275, Currier, J., said: "The name 'Charter Oak' with the combined device, in no possible view or application of them, are either descriptive or suggestive of the style, character, or qualities of a cast-iron cooking stove. In their natural significance, import, or symbolism, or in the use made of them prior to the plaintiff's appropriation of them as a trade-mark, they were as far removed as can well be imagined from conveying any such application or meaning. And that constitutes one of their virtues as a trade-mark. . . . The name and device selected by the plaintiff were adapted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark."

A person who forms a new composition, and invents a new word to charac-

terize it, is entitled to be protected in the exclusive use of such word as his trade-mark, and an injunction will issue to restrain others from appropriating it to designate a similar article. It was accordingly held, that the word "Ferro-Phosphorated" Elixir of Calisaya Bark, was a valid trade-mark. *Caswell v. Davis*, 35 How. Pr. (N. Y. C. Pl.) 76.

In *Burnett v. Phalon*, 3 Keyes (N. Y.) 594, the word "Cocoaine," as applied to a hair-oil, made from a preparation of cocoa-nut oil, was held to be a valid trade-mark. Davies, C. J., quotes with approval the language of Mr. Justice Duer in *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599: "Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute as his, may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates, is not only the evident duty of a court, as an act of justice, but the interests of the public, as well as of individuals, require that the necessary protection shall be given."

In *Braham v. Bustard*, 1 H. & M. 447, it was held that the word "Excelsior," as applied to white soft soap, was a valid trade-mark.

In *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156, the court decided that the phrase "Balm of Thousand Flowers," was a valid trade-mark, on the ground that the phrase was extrinsic and not indicative, and also that the defendants had avowedly and designedly adopted and used this name and these symbols of the plaintiff, to interfere with his trade and participate in his gains. The opinion of the court was given by Mr. Justice Hoffman.

In *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144, the court held that the words, "Balm of Thousand Flowers," were not a good trade-mark, on the ground that the phrase had become the distinctive and fanciful name of the

name, as that of a famous person or thing, or some character or thing of fiction or fancy.¹

3. Devices or Symbols.—Devices or symbols are the most usual forms of trade-marks. Any device or symbol may be protected

article, and also that the words were deceptive. The opinion was given by Mr. Justice Duer.

1. Plaintiff, a manufacturer of cotton cloth, stamped it with the words "Roger Williams Long Cloth." It was held, that the name was a valid trade-mark, being that of a dead celebrity. Ames, C. J., said: "We are not aware of any legal restriction upon a manufacturer's choice of a name for his trade-mark, any more than of his choice of a symbol, so that the name be so far peculiar, as applied to manufactured goods, as to be capable of distinguishing, when known in the market, one manufacturer's goods of a certain description from those of another. 'Roger Williams,' though the name of a famous person, long since dead, is, as applied to cotton cloth, a fancy name, as would be so applied, the names of Washington, Green, Perry, or of any other heroes, living or dead." *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452.

Plaintiffs, manufacturers of paper collars, sold them with the word "Bismarck" stamped on them. The court, by Brady, J., said: "There is no reason for making any distinction between a common word or term used for an original or new purpose which has accomplished its object, and a new design adopted by a manufacturer." *Messerole v. Tynberg*, 4 Abb. Pr. N. S. (N. Y. C. Pl.) 410; 36 How. Pr. (N. Y. C. Pl.) 14.

In the *United States* Patent Office, *Ex p. Pace*, 15 Pat. Off. Gaz. 909, an application for a trade-mark consisting of the word "Bayard" and the portrait of the *United States* senator of that name, was granted. But a geographical name, although also the name of an historical personage, is not a proper subject for trade-mark registration.

In the *United States* Patent Office, *Ex p. Oliver*, 18 Pat. Off. Gaz. 923, applicants were refused registration of the word "Raleigh" as a trade-mark of manufactured tobacco.

In *McAndrew v. Bassett*, 10 Jur. N. S. 492 and 550; 10 L. T. N. S. 65 and 442, plaintiffs, manufacturers of liquorice, stamped it with the word, "Anatolia." It was held a valid trade-mark, because, by use and occupation, the word had come to indicate ownership

and origin of the manufactured goods in complainant, in addition to the geographical location of the place where the liquorice was grown. Westbury, L. C., said: "I am told that this word 'Anatolia' being, in point of fact, the geographical designation of a whole country, is a word common to all, and that in it, therefore, there can be no property. That is nothing in the world more than a repetition of the fallacy which I have frequently had occasion to expose. Property in the word, for all purposes, cannot exist; but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped, and attains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public." See the comments on this case in the opinion of Strong, J., in *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 326.

"The plaintiff, who first applied the word 'Vienna,' to baked bread and other articles, having been engaged in manufacture, in the city of New York, of an article known as 'Vienna Bread,' and which he has for many years past sold with a label thereon containing the words 'Vienna Model Bakery,' can maintain an action restraining the use by other parties of a label in imitation of his own, and in particular, from applying the word 'Vienna' to baked articles." As a mark for bread, it is purely arbitrary, and is in no manner descriptive either of the ingredients or quality of the article. *Fleischman v. Schuckmann*, 62 How. Pr. (N. Y. Supreme Ct.) 92.

In *Edmonds v. Benhow, Seton* (3d ed.) 905; (4th ed.) 238, plaintiff, being the proprietor and publisher of a newspaper, called "The Real John Bull," defendants were enjoined from publishing a newspaper called "The Real John Bull," or "The Old Real John Bull." Examples of this kind are numerous. In *Chappell v. Davidson* (8 De G. M. & G. 1), the words "Minnie Dale," and "Minnie, dear Minnie," as applied to songs, were held to conflict with "Minnie."

as a trade-mark, which is arbitrary in its character and selection, and does not, by its inherent character, necessarily describe the goods upon which it is employed, nor contain any misrepresentation of fact with reference to the goods, their origin, character, qualities, or contents.¹

In *Ingram v. Stiff*, 5 Jur. N. S. 947, "The Daily London Journal" was held to invade "The London Journal."

"The Iron Trade Circular (Rylands)" and "The Iron Trade Circular (edited by Samuel Griffiths)," were held to conflict, in *Corns v. Griffiths*, W. N. 1873, p. 93; *Pemberton* (2d ed.) 309.

But "Punch" and "Punch and Judy" were held not to conflict, in *Bradbury v. Beeton*, 21 L. T. N. S. 323.

In *Gout v. Aleploglu*, 6 Beav. 69, note, plaintiff, long a manufacturer of watches for the Turkish and Levantine market, marked them with his name, a spring, etc., and the Turkish word "Pessen-dede" (meaning "warranted"). It was held to be a valid trade-mark, and an injunction was granted.

In *Barnett v. Leuchars*, 13 L. T. N. S. 495; 14 W. R. 166, a manufacturer of fireworks called them "Pharaoh's Serpents." This was sustained as a valid trade-mark and an injunction was granted.

Other examples are, "Dave Jones" and "Magnolia," as applied to whisky, *Kidd v. Mills*, 5 Pat. Off. Gaz. 337; "Charter Oak," as applied to stoves, *Filley v. Child*, 16 Blatchf. (U. S.) 376; "Lone Jack," as applied to tobacco, *Carroll v. Ertheiler*, Cox's Man. of Trade-Mark Cases 669; 21 Abb. L. Jour. 503. See also *Martha Washington Creamery, etc., Co. v. Martien*, 37 Fed. Rep. 797; 44 Fed. Rep. 473.

1. A label containing a marine picture with a small six-pointed star and the words "Star of Hope," is a valid trade-mark for a brand of tobacco. *In re Dexter*, 2 Ch. Div. 262.

In *Hutchinson v. Blumberg*, 51 Fed. Rep. 829, plaintiffs' device for a trade-mark for underwear consisted of a six-pointed star and the word "Star." Defendant began the use on underwear of a five-pointed star and crescent, the former being the prominent symbol, and the word "Star." It was held that plaintiffs had a valid trade-mark and an injunction was granted against infringement.

The device of a bottle with a panel or depression in the back, is not a

trade-mark. *Hoyt v. Hoyt*, 143 Pa. St. 623.

In *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411, Thayer, J., said: "The next matter to be considered is the charge that defendant uses the device of a book, with the words 'Webster's Dictionary' printed thereon, on its circulars, bill-heads, etc., in imitation of a like practice pursued by the complainants. In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter-heads and bill-heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark. When so used by a publisher or bookseller, such a device serves to indicate the kind of business in which a party is engaged, or it is descriptive of the contents of particular packages. Other persons engaged in the same business have the right to advertise their calling, or to describe the contents of packages, by the use of the same device. If a publisher or bookseller can acquire the exclusive right to use the device of a book on letter-heads, bill-heads, wrappers, etc., then a watch-maker might acquire the exclusive right to use the picture of a watch, a shoe-maker to use the picture of a shoe, and so on throughout the entire list of occupations in which men are engaged."

In *Harris Drug Co. v. Stucky*, 46 Fed. Rep. 624, where there was a picture of a boy suffering from cramps, with words "Cramp Cure," it was held that the picture constituted a valid trade-mark, but the words were descriptive.

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, Fuller, C. J., said: "In Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 322, it was said by Mr. Justice Strong, speaking for the court: 'That the office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer.' This may, in many cases, be done by a name, a mark,

or a device well known, but not previously applied to the same article."

The bronzing of horse-shoe nails cannot constitute a trade-mark. Paxon, C. J., said: "We have never yet carried the doctrine of trade-marks to the extent claimed for it by the plaintiff. We have never hesitated to restrain the imitation of a trade-mark when the facts justified it. We are now asked to go one step further and protect the manufacture of the article itself. This we do not see our way clear to do. The manufacture of a particular article can only be protected by a patent. The law in regard to trade-marks should not be pushed to the extent of interfering with manufacturers." Putnam Nail Co. v. Dulaney, 140 Pa. St. 205.

In *Frost v. Rindskopf*, 42 Fed. Rep. 408, it was held that the words "Warren Hose Supporter," with a cut of the garter, constituted a sufficiently arbitrary device to entitle plaintiffs to relief against simulation.

Bronzed horse-shoe nails are probably not a trade-mark. Putnam Nail Co. v. Bennett, 43 Fed. Rep. 800.

In *Re Australian Wine Importers*, 41 Ch. Div. 278, the device of a golden fleece, with words "Pure Old Scotch Whisky," was held a valid trade-mark.

In *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359, an elk's head, with the word "Elk" and the initials of the manufacturer, was held to constitute a valid trade-mark.

In *Johnson v. Hitchcock* (Supreme Ct.), 3 N. Y. Supp. 680, a representation of a flag, with stars studding the upper and lower borders in a very effective and striking way, in newspaper advertisements, was held to be sufficiently arbitrary to entitle plaintiff to relief against simulation.

In *Adams v. Heisel*, 31 Fed. Rep. 279, plaintiff was held entitled to a trade-mark in "Sappota Tolu" (a chewing gum), with various bands of color, arbitrarily arranged, but not in the form and size of the box, the sticks, or the arrangement of the latter in the box.

In *Foster v. Blood Balm Co.*, 77 Ga. 216, the following was held a sufficient trade-mark to entitle one to protection. Bleckley, C. J., said: "A device consisting chiefly of a letter of the alphabet nine times repeated, the repetitions being arranged in three vertical columns, separated by lines or bars, so as to form three groups of three B's (B B B), and when applied to the goods, each of three sides of the package presents

to the eye one of these triple combinations of B in conspicuous type. . . . It is not quite certain that, even as a technical trade-mark, nine B's, distributed into groups of three each, arranged in a given order, and placed in colored frames or settings, would not be sufficiently fanciful and arbitrary to be legitimate. There is no possible device or design which does not consist in its elements of something which is common to the whole world when it comes to be represented to the eye."

In *Re James' Trade-Marks*, 33 Ch. Div. 392, a black dome as a trade-mark for black lead was sustained. (Note distinction taken between American and English cases.) Lindley, L. J., said: "As regards the American decisions, I quite concur in the observations made by Lord Justice Cotton. I cannot see why, according to English law, a fish should not be a distinctive mark of a fishing-line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned pigskin into leather, I do not know why a pig should not be a good trade-mark for tanned pig's hide. I am not inclined to apply to English acts of parliament the American cases which have been cited." The court in this case overruled the decision below by Pearson, J., in which he said: "Curiously enough, though it has not arisen here, the question has been several times before the American courts, whether a man can have as a trade-mark a drawing of the article sold, and they have decided that he cannot, because it is the common property of all the world." See *In re James' Trade-marks*, 31 Ch. Div. 340.

In *Edelston v. Edelston*, 9 Jur. N. S. 479; 7 L. T. N. S. 768, the word "Anchor," used by a wire manufacturer as a trade-mark, was sustained.

In *Re Hudson*, 32 Ch. Div. 311, the following device was held a valid trade-mark: A label with a pattern around it, and then a certain amount of light, and then there is a dark patch in the center on which the name of *Hudson* and the words "Carbolic Acid Soap Powder" are printed, and there are other words around the label.

In *Anheuser-Busch Brewing Assoc. v. Clarke*, 165 P. & S.; 26 Fed. Rep. 410, the design of plaintiffs' label for

beer bottles consisted principally of a very striking diagonal red band. Defendant began to use a like symbol on his labels and an injunction was granted against him.

"It (a trade-mark) may be any symbol or emblem, however unmeaning in itself, as a cross, a bird, a quadruped, a castle, a star, a comet, a sun; or it may, and frequently does, consist of a combination of various objects copied from nature, art, or fancy." § 602. "The moral, religious, or political sensibilities of any people must not be shocked by the perversion of an emblem sacred in their eyes. There is no necessity for so doing, for the objects suitable for use as trade-marks are as infinite in number as the sands of the seashore. We must not blindly follow the loose, random sayings of judges that any emblem may be lawfully employed for this purpose." Browne on Trade-Marks (2d ed.), § 87 (1885).

"The original form of trade-marks was probably the representation of some animal, or other natural object, or mathematical figure, as the hall mark of the lion or leopard's head, the freemasons' square and compasses, or the government broad arrow. . . . Such marks are still frequently employed and this class specially includes them. To this class belong the marks of an anchor, an eagle, a lion, an elephant, a cross, a pyramid, a bell, a hand, a cock, a rising sun, or a triangle. A crest is just as capable of becoming a trade-mark as any other arbitrary device." Sebastian on Trade-Marks (2d ed.) (1884), p. 37. See *Edelston v. Edelston*, 1 De G. J. & S. 185; *Standish v. Whitwell*, 14 W. R. 512; *Henderson v. Jorss*, Dig. 198; *Cartier v. Carille*, 31 Beav. 292; *Cartier v. Westhead*, Dig. 199; *Cartier v. May*, Dig. 200; *Bass v. Dawber*, 19 L. & S. 626; *Bell v. Bell*, Dig. 514; *Allsopp v. Walker*, Dig. 545; *In re Walkden Aerated Waters Co.*, Dig. 558; *Morse v. Worrell*, 10 Phila. (Pa.) 168; *In re Worthington*, 14 Ch. Div. 8; *Steinthal v. Samson*, Dig. 546.

But as to the validity of the Freemasons' square and compasses as a trade-mark in the *United States*, see *In re Tolle*, 2 Pat. Off. Gaz. 415, and *In re Thomas*, 14 Pat. Off. Gaz. 821. In the former it was held that such a symbol had acquired a well-known special significance and its use would be deceptive. Thacher, Acting Com'r, said: "There can be no doubt that

this device, so commonly worn and employed by Masons, has an established mystic significance, universally recognized as existing; whether comprehended by all or not, is not material to this issue. . . . It will be universally understood, or misunderstood, as having a masonic significance, and therefore as a trade-mark must constantly work deception." In the latter case this view is departed from, holding that the Masons have no monopoly in their symbols.

In *Wilcox, etc., Sewing Mach. Co. v. Gibbons Frame*, 126 P. & S.; 17 Fed. Rep. 623, plaintiffs, manufacturers of a patented sewing machine, the frame of which was made in the shape of the letter G, endeavored, after the expiration of the patent, to establish the exclusive right to the use of this frame as a trade-mark, and brought suit to perpetually enjoin defendants from the use of it. It was held that the frame was a trade-mark inseparably associated with the patent, and after the expiration thereof, the public acquired a right to the whole. Wheeler, J., said: "All the effect which these frames have in representing machines to be those of the orator appears to be due to the monopoly enjoyed under the patents; and to give the orator the benefit of the effect by calling the frame a trade-mark, would continue the monopoly indefinitely, when under the law it should cease."

In *Lorillard v. Wight, P. & S.* 115; 15 Fed. Rep. 383, plaintiffs, manufacturers of plug tobacco, adopted, as a device, tin tags of various colors, blue and red, with the imprint of their name attached to each plug of tobacco. Defendant used tags of same size, shape, and color. It was held that plaintiffs had not the exclusive right to use tin tags, as they were common to the trade, but that defendant must be enjoined from the sale of tobacco with tags of similar color and size, and similarly marked, though with different names on the tag, so as to avoid the danger that the goods of the defendant might be sold as and for those of the plaintiff, in consequence of being designated by the same names as the plaintiffs, "Red Tag," "Blue Tag," etc.

In *Enoch Morgan's Son's Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294, plaintiff prepared and sold a soap for cleaning and polishing, labeled on one side of the package "Sapolio," etc., on the other, "Enoch Morgan's Son's

Sapolio," with a picture representing a human face reflected in a bright pan. The defendants sold similar soap in packages which bore little resemblance to those of the plaintiff save that on one side there was a small figure of a monkey, sitting down, tail in air, and looking at what is apparently a mirror in his hand. Rapallo, J., said: "The mere idea, represented by some figure on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated in a trade-mark."

In *Hegeman v. O'Byrne*, P. & S. 64; 9 Daly (N. Y.) 264, plaintiffs had a registered trade-mark consisting of an "eagle with outstretched wings, perched upon a mortar, in which rested a pestle." Defendants were using on a label a similar mark, the chief difference being in the name. It was held that, although these symbols were in common use among druggists, yet when used on labels and first registered by plaintiffs, they constituted a valid trade-mark and would be protected.

In *Ex p. Straiton*, 60 P. & S.; 18 Pat. Off. Gaz. 923, Marble, Comr., said: "Applicants in this case seek to register as a trade-mark for cigars, 'a waved band or ribbon of rectilinear form longer than it is wide, which is fastened to the two ends of a cigar box and so placed with reference to the cigars within the box as to be below some of said cigars and above the remaining cigars.' This was registered as a valid trade-mark."

In *Re Rotherham*, 14 Ch. Div. 585, it was held that Arabic and Turkish letters comprising words or names, are valid trade-marks, being to the English subject a "distinctive device."

A triangle, plain, inclosed by an oval with the words "Bass & Co.'s Pale Ale," forms a valid trade-mark. In *re Worthington*, 14 Ch. Div. 8.

In *Orr-Ewing v. Johnston*, 13 Ch. Div. 434; L. R., 7 App. Cas. 219, plaintiffs, being exporters of Turkey red yarn to *India*, had used for their trade-mark a device of which the principal features were two elephants, one in each corner, connected by a banner. Defendants, in introducing their yarn into *India*, had adopted a very similar device of elephants, etc. *India*, it will be noticed, is a country in which the picture of an elephant is very familiar. Cotton, L. J., said: "It is in evidence, and is undisputed, that for many years the plaintiffs' goods were sold by vari-

ous dealers in *India*, by Graham, and afterwards by others, and had been known either as 'Graham's Bhé Hathi' or 'Bhé Hathi' (two elephant) yarns. I refer to this as showing that in the minds of those who were purchasers of these goods the particular parts of the ticket with two elephants so placed, and with the surrounding circumstances, are a distinguishing feature of those labels. For, although there was evidence given on the part of the defendants, and it is admitted that there were numerous other tickets with elephants upon them, in very few instances do we find that any of the goods sold with these tickets have acquired the name of 'Elephant' tickets. . . . And the importance of that name, as I have already said, being attributed to goods sold with the plaintiffs' 'A' ticket, is, in my mind, simply to show how important as a distinctive part of this ticket the elephants of the plaintiffs, as so placed and so connected, were to the minds of the people who dealt in them, both in the markets of Bombay and Aden." It was held that the circumstances indicated fraud, or at least probable damage resulting from the simulation, and entitled the plaintiffs to relief.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Field, J., said: "Every one is at liberty to affix to a product of his own manufacture any symbol or device not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others. . . . The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311. . . . A citation is made from the opinion of the superior court of the city of New York in the case of the present complainant against Spear, reported in the 2d of Sandford, that 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their

names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

In *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427, Monell, C. J., said: "A trade-mark may consist of anything, marks, forms, symbols, which designate the true origin or ownership of the article. It cannot consist of anything which merely denotes the name or quality. See *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. . . . The copy of the coat-of-arms of the city of Paris, when in connection or combination with other marks, words or devices, not denoting name or quality, will cover a property in it which will prevent its use in the same connection or combination by another person." See also *Radde v. Norman*, 26 L. T. N. S. 788, where this doctrine is reaffirmed.

In *Harrington v. Libby*, 6 P. & S.; 14 Blatchf. (U. S.) 128, it was held that a decorative tin pail with handle, used to contain collars and sold with them, was not a trade-mark. Johnson, J., said: "The question whether anyone can seize upon such an article and make title to its exclusive use for a special purpose by calling it a trade-mark, must be far from clear in favor of the claimant. The forms and materials of packages to contain articles of merchandise, if such claim should be allowed, would be rapidly taken up and appropriated by dealers, until some one, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property."

Quære: Can the figure of a pig be a valid trade-mark for "prime leaf lard?" The objection is that it is descriptive and might with equal truth be employed to represent any other products of the pig put up for sale. *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22; *Cox's Man. of Trade-Mark Cases* 425.

A fish is not a valid trade-mark for fishing-lines, because descriptive. *In re Pratt*, *Cox's Man. of Trade-Mark Cases* 527; 10 Pat. Off. Gaz. 866; Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 311, is cited as conclusive.

In *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 392, plaintiffs were using as a trade-mark a combination of a maltese cross, three A's and the words "Old Valley Whisky," the whole branded into the head of a

barrel. The defendants began to use the same general mark, only substituting three X's for the three A's. It was held that the whole device of the plaintiffs constituted a valid trade-mark and entitled them to protection.

In *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76, plaintiffs, manufacturers of washing powder, sought to have protected from simulation, as a trade-mark, a picture of a washing-room scene with its various phases, etc. *Sanderson, J.*, said: "The plaintiffs claim their entire label as their trade-mark and ask to be protected in the use of it as a whole; but it is clear that the common law gives no countenance to such a claim. Only so much of their label as serves to indicate that they are the manufacturers or vendors of the washing powder can be considered as constituting the legitimate characteristics of a common-law trade-mark. . . . Indeed, it may be doubted whether the picture can be considered as matter of trade-mark." But see *Browne on Trade-marks* (2d ed.), §§ 259, 262.

In *Harrison v. Taylor*, 11 Jur. N. S. 408; 12 L. T. N. S. 339, the plaintiffs were manufacturers of mustard, which they sold with a label affixed, the conspicuous feature of which was the figure of an ox; the defendants sold other mustard with a very similar label, and "ox" trade-mark, but having their own name substituted for that of the plaintiff. An injunction was granted to restrain defendants from infringing rights of plaintiffs by the use of "ox" trade-mark, notwithstanding that a certain class of customers were in the habit of asking for "Harrison" mustard and not "ox" mustard.

In *Knott v. Morgan*, 2 Keen 213, an injunction was granted to restrain defendant from running an omnibus having upon it such names, words, and devices, as to form a colorable imitation of the words, names, and devices on the omnibuses of the plaintiff. Among the devices referred to was a star and garter painted on the side of plaintiff's omnibus, as also the peculiarity of the livery and caps of the coachmen. In this case relief was granted, although it did not appear that the plaintiff had an exclusive right to the words in question. In this it goes further than *Stone v. Carlan*, 13 Monthly L. Reg. 360, and *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723, where there was an exclusive right to the names of the hotels "Irving Hotel"

4. **Numerals.**—Numerals, if employed arbitrarily to indicate ownership and origin, and not grade or quality, will be sustained as valid trade-marks. In the *United States*, the question whether a number will be sustained or not, will generally depend upon the proof with reference to the intention of the person using it; if it was adopted as a purely arbitrary figure, without any purpose or intent of using it to indicate quality or grade, it will be sustained, and this will probably be true although by use the number may, to some extent, have come to indicate a particular quality of goods. If, however, the number or letter was originally adopted for the purpose of indicating quality merely, no subsequent acceptance of the mark by the public, as an indication of ownership and origin, can entitle the mark to protection. The English rule differs from this, and seems to be more logical, and in accord with the fundamental principle of trade-mark law, that the honest trader is to be protected in all the benefits of his reputation, and the defendant is not to be permitted to use any symbols, or do any act which would deceive the public and defraud the honest trader out of the benefits of his hard-earned reputation. On this principle, the English courts have held that letters or numbers which, although adopted and used for the purpose of indicating grade or quality, have yet, by use, come to indicate to the trade the origin and ownership of the goods to which they are attached, will be protected as valid trade-marks.¹

and "Revere House," out of which flowed the exclusive right to use the name on coaches, badges, etc.

In *Mitchell v. Henry*, 15 Ch. Div. 181, 188, where the plaintiff's trade-mark was described as a trade-mark applicable to "worsted stuffs," by the following description, "a white selvage on each side of the piece, having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage," it was decided that the intermixture of colors constituted a distinctive device entitled to protection, but that in the particular case the defendants were not guilty of infringement.

Where goods of a trader have acquired a specific name from the appearance of a trade-mark, no other trader will be allowed to use a mark which, though different, would cause his goods to be known by the same name. *Seixo v. Provoze*, L. R., 1 Ch. 195; *Edelston v. Edelston*, 1 De G. J. & S. 185; 9 Jur. N. S. 479.

1. In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; 31 Fed. Rep. 776, the plaintiff, a manufacturer of sheetings, stamped on one grade the

letters "L L" and claimed a trade-mark therein. It was held that the letters were merely indicative of quality. Fuller, C. J., said: "Nothing is better settled than that an exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Stratton*, 12 Fed. Rep. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture, or ownership, but was placed upon the article to denote class, grade, style, or quality, it cannot be upheld as technically a trade-mark."

In *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, the complainant, a manufacturer of buttons and nails, distinguished certain styles which he made, by certain numerals arbitrarily chosen. These were held to be valid trade-marks. The court, by Stiness, J., said: "A person may have different

symbols for different grades of goods, which, in the same way, will indicate both quality and origin with respect to the goods so marked. A manufacturer may adopt such symbols, not simply to mark *a* style or quality, but *his* style and *his* quality as well. He is entitled to have *his* style and *his* quality protected from misrepresentation, and to have the benefit of any favorable reputation they may have gained."

In *Avery v. Meikle*, 81 Ky. 73, plaintiffs, manufacturers of plows, stamped their steel series with letters "A O," "B O," etc., and their cast series with "1/2," "1," "2," "3," and "8." Defendants manufactured plows in exact imitation of the plaintiffs, in almost every particular. It was held that the plaintiffs had no exclusive right to such letters or figures, but an injunction was granted on the ground of fraud and unfair competition. The court, by Hargis, C. J., said: "As to the numerals '1/2,' '1,' etc., they were used by appellants to denote the size and quality of their cast series. This is the evidence, and although the letters and numerals on both series may have come to indicate to the public the origin and ownership of appellants' plows, as they did not appropriate them by adoption, use, or claim, as a part of their trade-mark, they cannot be treated as a part of it simply because they appear capable of serving the same purpose."

In *Humphreys Specific Homeopathic Co. v. Wenz*, 14 Fed. Rep. 250, the plaintiff had for a long period, manufactured and sold a series of homeopathic specific medicines, labeled with a series of numbers running from "1" to "35," each number being applied to a medicine for a particular disease or class of diseases. It appeared that the remedies were frequently purchased by the public by the numbers alone. It was held that the plaintiff could be protected in the use of the serial numbers as applied to "Homeopathic Specifics," and a preliminary injunction was granted.

In *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707, plaintiffs, manufacturers of hosiery, packed them in boxes having labels of various peculiarities attached, the most prominent feature of which was the number "830," long used to designate seamless half-hose of mottled drab color, manufactured by them. Defendants sold hose with similar labels, and using the same number. It was held that the plaintiffs had an ex-

clusive right to the use of the number "830" as applied to mottled drab hose, and an injunction was granted. Coxe, D. J., said: "Where the courts have refused protection to alleged trade-marks composed of letters or numerals, it has been because, on the facts of each case, it was determined that the figures or letters were intended solely to indicate quality, etc., and not because figures and letters in arbitrary combination are incapable of being used as trade-marks. It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3, and 4, or the letters A, B, C, and D, to distinguish the first, second, third, and fourth quality of his goods respectively. Why? Because the general signification and common use of these letters and figures are such, that no man is permitted to assign a personal and private meaning to that which has by long usage and universal acceptance acquired a public and generic meaning. It is equally clear, however, that if for a long period of time he had used the same figures in combination, as, '3214,' to distinguish his own goods from those of others, so that the public had come to know them by these numerals, he would be protected. . . . The right to use a trade-mark is one depending upon use, and it appears that complainant had used these numerals long enough to convey to any one versed in the nomenclature of the trade, a precise understanding of what goods were intended when the numerals were used alone, disconnected from any extrinsic information."

In *Ransome v. Graham*, 47 L. T. N. S. 218, plaintiff, a manufacturer of plows, marked his goods with a series of letters, figures, etc., purporting to indicate the manufacturer, and also indicative of quality, the marks being exclusively used by the manufacturer. They were held to be valid trade-marks, and an injunction was granted.

In *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325; 37 Am. Rep. 362, plaintiffs used as a trade-mark for hosiery, certain devices with the figures "523" beneath them. It was held that numerals, arbitrarily selected, and used on goods in combination with other devices, to denote the origin of the goods, and not their quality, are a valid trade-mark. The court, by Colt, J., said: "A trade-mark when applied to manufactured articles may well consist of the name and address of the

manufacturer, with the addition of some peculiar device or emblem, some curious forms or figures, so disposed as to attract attention, impress the memory, and advertise more effectually the origin of the article to which it is attached.

. . . It may be that even numerals or letters of the alphabet can be combined and printed in such unusual and peculiar forms, that the result would be quite sufficient for use as a trade-mark."

In *Collins v. Reynolds Card Mfg. Co.*, 7 Abb. N. Cas. (N. Y.) 17, plaintiffs used the figures "35" to designate certain kinds of photographic cards of their manufacture, the labels, however, not containing the name of the plaintiffs. It was held, that plaintiffs have a trade-mark in those figures, and are entitled to protection in a court of equity. The court said: "In the case at bar, the labels do not contain the name of the plaintiffs as makers, but the evidence satisfies me, beyond doubt, that the figures '35' were known to and recognized by dealers, when employed as designating *carte de visite* mounts, as referring to the particular kind of card which was manufactured by the plaintiffs."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, complainants used the letters "A. C. A.," applying them to the highest grade of ticking which they manufactured. It was held that the letters denoted quality only and formed no part of a valid trade-mark. The same principle applies to figures. Field, J., said: "Letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation; but are open to use by anyone, like the adjectives of the language." See opinion by Clifford, J., *dissenting*, which seems to state the more logical rule.

In *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 268, plaintiff, a manufacturer of rubber goods, claimed an exclusive right to the numbers, "2," "101," and "32," used by him to designate different classes of rubber goods. It was held that the principles of *Gillott v. Esterbrook*, 48 N. Y. 375; 8 Am. Rep. 553, applied; that the numbers were selected arbitrarily, and the plaintiff was entitled to protection in his use of the same. The court said: "The numbers were used to distinguish one pattern or character of goods from other patterns. In this

case, the defendant's labels prove that the numbers were useful in the market to designate these patterns. The numbers were selected arbitrarily, and of themselves expressed no size or quality."

In *Carver v. Bawker*, Lancaster Chanc., Little, V. C.; British and Foreign Journal of Commerce and Trade-Marks 252; Cox's Man. of Trade-Mark Cases 581, plaintiff, a shipper of cotton goods, stamped them, among other things, with the numbers "109," "406," "409," etc., respectively. It was held that the number "109" was in common use and descriptive of quality, and that the other numbers, although not in common use, could not be exclusively appropriated.

In *Kinney v. Allen*, 1 Hughes (U. S.) 106, plaintiff, a manufacturer of cigarettes, placed upon boxes, etc., containing them, the symbol " $\frac{1}{2}$ " printed in large red characters. Defendant sold other cigarettes with a similarly printed " $\frac{1}{2}$ " as a trade-mark. A limited injunction was granted to restrain defendants from using the symbol in that form, but not the symbol itself, on the ground that the symbol was not absolutely arbitrary, it being originally used to indicate that cigarettes stamped with it were composed of two kinds of tobacco in equal proportions.

In *Kinney v. Basch*, 16 Am. L. Reg. N. S. 596, plaintiff used the numerical symbol " $\frac{1}{2}$ " with other items, as a trade-mark for cigarettes. Defendants used similar marks, the symbol " $\frac{1}{2}$ " being identical in shape, etc., as that of the plaintiff. An injunction was granted on the ground that, whether or not plaintiff had an exclusive right to the marks in question, defendants had acted with intention to deceive. The court, by Van Brunt, J., said: "If the use of any words, numerals or symbols is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals or symbols."

In *Dawes v. Davies*, Codd. Dig. of Trade-Marks 260, plaintiff used as a trade-mark for umbrellas, the number "140" in a white oblong placed in the middle of a five-pointed star. Defendants used in the same way the number "142" within a sun-burst. A motion for an injunction was refused, on the ground that no one of ordinary intelli-

gence could mistake the one device for the other.

In *Glen, etc., Mfg. Co. v. Hall*, 6 Lans. (N. Y.) 158; 61 N. Y. 226; 19 Am. Rep. 278, the defendant was the assignee of the owner of a manufacturing establishment known as "Number 10 South Water Street." Plaintiff took a shop near by, and painted the same number on it, and on its bills and signs. It was held by a divided court, that defendant was entitled to relief, and a perpetual injunction was granted against plaintiff to restrain him from using "Number 10" as a part of his trade-mark, or in association with the words "South Water Street." In *Ex p. Dawes*, 1 Pat. Off. Gaz. 27, applicants sought to register the number "140" as a trade-mark for umbrellas. It was held a valid trade-mark within the *United States* statute of 1870. The court said: "It is an arbitrary combination of numerals, having, as used, no other meaning than to distinguish the applicant's goods in the market, and indicate to purchasers that all umbrellas bearing this mark have one and the same origin."

In *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270, plaintiffs, manufacturers of teaspoons, sold them in packages, with labels attached bearing the names of the plaintiffs, certain numbers arbitrarily chosen to indicate different classes of their own spoons, and certain other peculiarities. It was held that these labels constituted legal trade-marks. The court said: "It may be difficult to give to bare numbers the effect of indicating origin or ownership; and it may be still more difficult to show that they were originally designed for that purpose; but if it be once shown that that was the original design, and that they have had that effect, it may not be easy to assign a reason why they should not receive the same protection, as trade-marks, as any other symbol or device."

In *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; 48 N. Y. 374; 8 Am. Rep. 553, the plaintiff made and stamped his pens "Joseph Gillott Extra Fine, 303;" defendants sold other pens with similar stamps, only replacing "Joseph Gillott" by "Esterbrook & Co." An injunction was granted to restrain defendants from using the figures "303." The court said: "These symbols or figures do not of themselves indicate any appropriate name of this pen, nor any mode or process by which it is

manufactured. They do not indicate the quality of the pen, but, connected as they are with the plaintiff's name, they indicate the origin and ownership of the pen, and were intended by him, with the addition of the words 'extra fine,' impressed thereon, also to designate the pattern of this pen as distinguished from other pens of his manufacture represented by other numerals, and also to distinguish it as the pen of his manufacture."

In *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125, plaintiff, a manufacturer of plows, used, among other things, certain combinations of letters and figures to designate the various sizes, forms, etc., of their make. It was held that they denoted quality, and were not valid trade-marks. The court, by Breese, J., said: "The case of *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, is said to be the leading American case on the question of trade-marks, and in that it was held that although, by the long continued use of certain words, letters, marks, or symbols, which do not, of themselves, and were not designed to indicate the origin or ownership of the goods to which they are affixed, the goods so marked, and because so marked, have become known as those of the manufacturer who first used them, such fact cannot alter the original meaning of the words or symbols, or the intent with which they were first used, as denoting the name of the thing, or its general or relative quality, or take from others the right to employ them in the same sense."

In *Gillott v. Kettle*, 3 Duer (N. Y.) 624, plaintiff made and sold pens put up in boxes, marked respectively "303" and "753," the latter denoting the inferior, the former, the superior quality. Defendant removed labels from boxes containing the inferior pens, replacing them with labels, imitated from the plaintiff's, and putting thereon the number "303." An injunction was granted to restrain defendant from so doing.

In *Ransome v. Bentall*, 3 L. J. Ch. N. S. 161, plaintiffs marked their plowshares with the words, "Ransome's Patent," the letters "H. H.," and the number "6," denoting size. The combination "H. H. 6," was held to be a valid trade-mark, and an injunction was granted.

The distinction between the English and American cases concerning numerals as trade-marks, is not very decided. On the whole, the English courts may be said to be more cautious

5. **Letters.**—Letters may be sustained as a valid trade-mark, on the same principle as numerals, where they are arbitrarily selected, or where they stand for the name of the manufacturer or vendor of goods, and are not used, and were not intended to be used, to indicate quality or grade. This rule is subject to the condition that letters are common property and cannot be exclusively appropriated by any one so as to prevent their use in a usual and legitimate way by others, as, for example, to designate the name of another manufacturer of different name, but the same initials. Even this rule is subject to the same qualification which applies to persons of the same name; that a person will not be permitted to so use his own name as to deceive the public and defraud a rival trader.¹

in allowing their use than the American. No case appears to be reported in which they have admitted a numeral standing alone to be a technical trade-mark, although they have upheld their validity when used in connection with other devices, and have interfered to prevent infringement on the ground of unfair competition. *Ransome v. Bentall*, 3 L. J. Ch. N. S. 161.

In *America*, it has been held that a mere numeral, standing without the name of the manufacturer, is entitled to protection. *Collins v. Reynolds Card Mfg. Co.*, 7 Abb. N. Cas. (N. Y.) 17.

In *England*, by the Patents Act of 1883, numerals can be registered as a part of a new mark, only when combined with some essential particular, while in *America*, a numeral standing alone may be registered. *Ex p. Dawes*, 1 Pat. Off. Gaz. 27.

1. The letters "L L," being used in the trade to denote the quality of cotton sheetings, do not constitute a good trade-mark. *Fuller, C. J.*, said: "Nothing is better settled than that an exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Stratton*, 12 Fed. Rep. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture, or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as tech-

nically a trade-mark." *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537.

The letters "G. F.," as applied to velvet ribbons, constitute a valid trade-mark. *Geron v. Gartner*, 47 Fed. Rep. 467.

The letters "N. S.," used to designate a manufacture of cigars, are indicative of the origin and ownership, and have been held a valid trade-mark. *Frank v. Sleeper*, 150 Mass. 583.

The letters "L L," used to designate cotton sheetings, being indicative of grade, class and quality in the trade, do not constitute a valid trade-mark. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. Rep. 776.

In *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707, *Coxe, J.*, said: "A careful examination of the authorities cited by the learned counsel for the defendants, leads to the conclusion that where the courts have refused protection to alleged trade-marks composed of letters or numerals, it has been because, on the facts of each case, it was determined that the figures or letters were intended solely to indicate quality, etc., and not because figures and letters in arbitrary combination are incapable of being used as trade-marks. It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3 and 4, or the letters A, B, C and D, to distinguish the first, second, third and fourth quality of his goods, respectively. Why? Because the general signification and common use of these letters and figures are such, that no man is permitted to assign a personal and private meaning to that which has by long usage and universal acceptance acquired a public and generic meaning."

The letters "A. C. A.," being used to

6. **Name of Inventor or Maker**—*a.* IN GENERAL.—The name of an inventor or maker is the best guaranty of the genuineness of the goods which bear the name, and will, as a general rule, be protected as an exclusive trade-mark, if used in a way which is free from misrepresentation or fraud.

The inventor or first maker of an article, who gives his name to the article of his invention or manufacture, can cause the article to become so associated with his business and manufacture as to cause his name in time to cease to indicate him as the manufacturer of the goods, and his peculiar personal skill and character, and come to mean the goods made at a particular factory; or, if the process of manufacture involves any particular method or care and skill in selection and manipulation, the character and quality of the goods themselves. When this is the case, a proper name which has in this manner become attached to goods may, without

denote the quality of a ticking, are not a valid trade-mark. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 55. See also *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

The letters "A. G.," used as a label for Julienne, constitute a valid trade-mark. *Godillot v. Harris*, 81 N. Y. 263.

The letters "IXL," as applied to a general merchandise auction store, do not constitute a valid trade-mark. *Lichenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592.

The letters "M & C," together with a star, all inclosed in a circular ring, used to designate the make of a wine, have been held a valid trade-mark. *Moet v. Pickering*, 6 Ch. Div. 770; Appeal reported in 3 Ch. Div. 372.

The letters "A A A" and a maltese cross stamped on barrels of whisky, constitute a good trade-mark. *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 392.

The letters and numerals, "A No. 1," "A X No. 1," "No. 1," "No. 3," and "B No. 1," as applied to plows for the purpose of designating the size, shape and quality of the different plows, are not good trade-marks. *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125.

The letter "K," as a mark for silicas, not indicative of the origin or ownership of the goods, is not a valid trade-mark. *Ferguson v. Davol Mills*, 2 Brews. (Pa.) 314.

In *Bury v. Bedford*, 4 De G. J. & S. 352, the mark in question consisted of the figure of a lion couchant, surmounted by crossed arrows within four initial letters, "J. O. B. S.," with the

spaces formed by the arrows, which were to be read as signifying John Bedford, Oughtinbridge and Sheffield. It was used on steel. It was held to be a valid trade-mark.

The letters "B. B. II.," surmounted by a crown, the letters being initials of the partnership firm, and applied to iron manufactured, constitute a valid trade-mark. *Hall v. Barrows*, 4 De G. J. & S. 150. See also *Barrows v. Pell-sall Coal, etc., Co.*, decided Jan. 11th, 1877, per Hall, V. C., and *In re Barrows*, 5 Ch. Div. 364.

The letters "C. B." and a cross, used to designate a brand of cotton for embroidery, have been held a valid trade-mark. *Cartier v. Carlile*, 8 Jur. N. S. 183.

The letters "A. C. A." being used to denote the quality of tickings, do not constitute a valid trade-mark. *Duer, J.*, said: "The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to an exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

The letters "J. H.," used as a mark on

incurring the charge of misrepresentation, be used by the successors in business or assigns of the original inventor or maker, and will be protected in their hands; but this rule is subject to the qualification that other persons of the same name cannot be enjoined from employing their own name in an honest and legitimate manner upon goods of their own manufacture or selection, provided that, in doing so, they do not so use their own name as to practice a fraud upon their rival or deceive the public.¹

manufactured steel, constitute a valid trade-mark. *Millington v. Fox*, 3 Myl. & C. 338.

The letters "M. C." used to designate a brand of tin plates, do not constitute a valid trade-mark. *Motley v. Dawnman*, 3 Myl. & C. 1.

In *Ransome v. Bentall*, 3 L. J. Ch. N. S. 161, the combination "H. H. 6," the numeral 6 being used only to denote the size of plowshares, was held a valid trade-mark.

1. Hohner is a well-known maker of harmonicas in *Wurtemberg*, most of which are sold under his name in this country. *Leiterd* made harmonicas in *Saxony*, and put upon them his own name, partly in monogram, with the word "Mach," and the words "Improved Hohner" in larger and plainer letters, and sold them through an agent. An injunction was granted and an accounting ordered. *Hohner v. Gratz*, 52 Fed. Rep. 871.

In *Foster v. Webster Piano Co.* (Supreme Ct.), 13 N. Y. Supp. 338, an action was brought by William Foster as substituted trustee, etc., of the last will and testament of Albert Weber, deceased, whose trade-mark was "Weber, New York," against the defendants, asking for an injunction restraining them from putting on their pianos "Webster, New York." It was held that the defendant's trade-mark was not likely to deceive, and the injunction was refused.

In *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, the defendant declared in his invoices, price lists, etc., that his machines were made on the "Singer System;" he also put on some machines a label with the words "Singer Machines." An injunction was granted as to the label, but refused as to the invoices, price lists, etc., on the ground that they were not calculated to deceive by representing the defendant's machine to have been manufactured by the plaintiffs. See also *Singer Mfg. Co. v. Loog*, 18 Ch. Div. 395;

Singer Mfg. Co. v. Wilson, 3 App. Cas. 376; *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434; *Singer v. Spence*, T. M. Rec. Sept.

In *Marshall v. Pinkham*, 52 Wis. 572; 38 Am. Rep. 756, various members of a family were entitled to manufacture and sell "Old Dr. Marshall's Celebrated Liniment," by permission of their father, the original manufacturer. The wife succeeded to the business of her husband and sold out to one of the sons, who sought to restrain the other children. It was held that the son had no exclusive right as against the others, or their assigns.

In *McLean v. Fleming*, 96 U. S. 245, the court held that Fleming, having acquired the right to manufacture "Dr. McLean's Liver Pills," was entitled to restrain McLean from manufacturing and selling "Dr. McLean's Universal Liver Pills." Clifford, J., said: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled."

Carmichael & Co., being the successors by purchase of *Stillman & Co.*, woolen manufacturers, continued to use "Stillman & Co." as a trade-mark on their goods. Latimer, Stillman & Co., the lessees of a mill formerly used by Stillman & Co., known both as the "Stillman Mill" and as the "Seventh Day Mill," used "Stillman Mills" as a trade-mark. An injunction was refused as to the word "Stillman," on the ground that a manufacturer has the right to label his goods with his own name or that of his mill, if no fraudulent purpose is intended. *Carmichael v. Latimer*, 11 R. I. 395; 23 Am. Rep. 481.

In *Schweitzer v. Atkins*, 19 L. T. N. S. 6, the plaintiff was selling an article

b. PERSONS OF THE SAME NAME.—Every man has an inherent right to use his own name upon his own goods to indicate their origin and ownership, and also to guarantee their character and quality; but the use of a man's name must be strictly confined to this purpose. He must use his name so as to indicate that the goods bearing it are his own goods and not those of another; and where one manufacturer or trader has established an extensive trade for an article of his make or selection, and employed his name as a trade-mark therefor, it behooves other traders having the same name, who subsequently go into competition with him, to so use the name as to avoid so far as possible all danger of deception of the public, or the sale of their goods as and for the goods of the trader who has first used the proper name upon his goods. This is a question of frequent occurrence, and it is believed that the tendency of the courts is to protect the industrious and successful manufacturer or vendor in all the fruits of his labor and industry, and to require that the rival of the same name who follows in his footsteps, shall exercise unusual care in the use of his own name to prevent injury to the one who has first used the name and established its reputation.¹

called "Schweitzer's Cocomatina." The defendant began selling "Otto Schweitzer Atkins & Co.'s Cocomatina." An injunction was granted.

In *Howe v. Howe Machine Co.*, 50 Barb. (N. Y.) 236, it was held that the plaintiff had a right to adopt and appropriate his surname as a trade-mark; and that Elias Howe, Jr., though his surname was the same, had no right to use his own name in such a way as to deceive the public, and deprive the plaintiff of the benefit of the notoriety and market which his machine had gained.

The name of an inventor, discoverer, or manufacturer may be employed as part of a trade-mark, and hence the words, "Dr. J. M. Lindsey's Improved Blood Searcher," have been held to be a valid trade-mark. *Fulton v. Sellers*, 4 Brews. (Pa.) 42.

In *Ainsworth v. Walmsley*, 1 Eq. Cas. 518, Wood, V. C., said: "Is not a man's name as strong an instance of a trade-mark as can be suggested, subject only to this inconvenience, that if a Mr. Jones or a Mr. Brown relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name. But there is no evidence before me that any other person than the plaintiff has ever been heard of as manufacturing Ainsworth's thread; and therefore, 'Ainsworth's Thread' is as good a

mark as 'Anchor Thread,' 'Lion Thread,' or any other which may be described by a particular name."

In *Samuel v. Berger*, 24 Barb. (N. Y.) 163, a watchmaker named Brindle had acquired a reputation as such, and all his watches were stamped with his name. Plaintiff, having acquired the right to stamp the name of "Brindle" on watches of his own make, sought to restrain the defendant from selling watches which he had on hand, manufactured by Brindle and stamped with his name, and which were the genuine articles. The injunction was refused.

Crowley was a manufacturer of steel, and used his name as a trade-mark. Millington, the grandfather of the plaintiff, succeeded to the business and used Crowley's name and his own as trade-marks. The plaintiff had the right to use the trade names, and the defendants having used the plaintiff's trade-marks, an injunction was granted. *Millington v. Fox*, 3 Myl. & C. 338.

1. In *Brown Chemical Company v. Meyer*, 139 U. S. 540, it was held that the plaintiff or corporation organized under the laws of the State of Maryland, and the manufacturer of "Brown's Iron Tonic," could not restrain the defendants, successors in business of one Brown, who manufactured "Brown's Iron Tonic," when there was no evidence to show an intention to palm off their preparation as that of the plaintiff,

as they have a perfect right to such use in the absence of such evidence.

In *El Models Cigar Mfg. Co. v. Gato*, 25 Fla. 886, the complainant manufactured cigars and marked them with his name, "E. H. Gato." The defendant company had a person in their company, who was the junior member, named "G. H. Gats," and they stamped his name on their boxes of cigars. It was done to palm off their goods as the complainant's, and an injunction was granted.

In *Turton v. Turton*, 42 Ch. Div. 128, the plaintiffs had for many years carried on the business of steel manufacturers under the name of "Thomas Turton & Sons." The defendant, John Turton, had for many years carried on a similar business in the same town, at first as John Turton, then as John Turton & Co. In 1888, he took his two sons into partnership and carried on the same business as "John Turton & Sons." There was no evidence that the defendant imitated the trade-marks or labels of the plaintiffs, or otherwise attempted to deceive the public. It was held that, although there was a probability that the public would be excessively misled by the similarity of the names, the plaintiffs were not entitled to an injunction restraining the defendants from using the name of "John Turton & Sons."

In *Jennings v. Johnson*, 37 Fed. Rep. 364, the plaintiff was entitled to manufacture "Johnson's Anodyne Liniment," which had been manufactured and sold for over fifty years, put up in certain sized bottles, etc., and with also a facsimile of the name of A. Johnson. Defendant's article was called "Johnson's Anodyne Liniment," and appeared in the same sized bottles, etc., but bore the name of "F. E. Johnson." There was evidence of actual deception. The defendant was restrained.

In *William Rogers Mfg. Co. v. Simpson*, 54 Conn. 527, the complainant corporation, having procured the right from William Rogers, Sr., who had a great reputation as a silverware manufacturer, to manufacture and stamp his name on silverware, asked for an injunction to restrain the defendant corporation from using the same name, "William Rogers," on their silverware, the defendant corporation having procured the right from William Rogers, Jr., whose reputation was also valuable. An injunction was refused, as the statements were not made with a fraudulent

intent to mislead the public into the belief that the goods so advertised were those of the plaintiff. See also *Rogers v. Rogers*, 53 Conn. 121; 55 Am. Rep. 78.

In *Landreth v. Landreth*, 22 Fed. Rep. 41, the complainant sold peas called "Landreth's Extra Early Peas." The defendant sold peas called by the same name, which was done to deceive. An injunction was granted. The court said: "Even admitting that the defendant has the right to use the same words as those which constitute the complainant's label, he has no right to use them in such form or such style of arrangement, as to lead the public to suppose that the (goods) . . . contained in his bags are . . . grown and sold by the complainant."

In *Shaver v. Shaver*, 54 Iowa 208; 37 Am. Rep. 194, the plaintiff, being a manufacturer of wagons, used as a trade-mark, "Shaver Wagon, Eldora," which was painted on the sides of all his wagons. The defendant having painted the same on his wagons, an injunction was granted against him.

Joseph Thorley for many years manufactured and sold extensively an article called "Thorley's Food for Cattle." His executors continued the business. Shortly after his death, a company was formed by other persons under the name of J. W. Thorley's Cattle Food Company, in which J. W. Thorley, a brother of Joseph Thorley, took a one-shilling share. J. W. Thorley had been employed by Joseph Thorley, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "Thorley's Food for Cattle." James, L. J., said: "I am, therefore, of opinion, that in this case what the defendant company have done has been calculated to deceive, and I am bound to say, in my judgment, I have no doubt was from the first intended to deceive the persons purchasing their article into the belief that they were purchasing the article which Joseph Thorley had formerly manufactured at the works which had attained the great reputation which Thorley's manufacture appears to have obtained." *Masam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748; 6 Ch. Div. 574. After commenting on *James v. James*, L. R., 13 Eq. Cas. 421, cited *infra*, this note, the judge refuses to be bound by it.

Devlin and others were engaged in

the clothing business and under the name of "Devlin & Co." The defendant was engaged in the same business, and was enjoined from using the sign to deceive. *Devlin v. Devlin*, 69 N. Y. 212; 25 Am. Rep. 173.

In *England v. New York Publishing Co.*, 8 Daly (N. Y.) 375, the plaintiff had his name changed from Henry Carter to Frank Leslie, and published various newspapers under titles of which the words "Frank Leslie's" formed, in each instance, a part. The defendant's name is Frank Leslie and he is a son of the plaintiff. He organized a corporation under the name of the New York Publishing Co., commenced the publication of a paper, entitled "Frank Leslie, Junior's, Sporting and Dramatic Times." An injunction against defendant was refused, because he was entitled to use the name Frank Leslie.

In *Prince Metallic Paint Co. v. Carbon Metallic Paint Co.*, Codd. Dig. of Trade-Marks 209, the plaintiffs were manufacturers of paint and used as a trade-mark "Prince's Metallic Paint." The defendants were brothers, who manufactured and sold a paint marked "Prince Bros. Iron Ore Paint." An injunction was refused; but see opinion of the court of appeals, N. Y. 1893.

In *Gilman v. Hunnewell*, 122 Mass. 139, the plaintiffs, as assignees of John L. Hunnewell, manufactured certain medicines called "Hunnewell's Electric Pills," etc. The defendants, Edwin Hunnewell and another, manufactured similar medicines, called "Hunnewell's Family Pills," etc., etc. There being no proof of fraud on the part of the defendants, or any representation that the medicines made by them were manufactured by the plaintiffs, an injunction was refused.

In *Decker v. Decker*, 52 How. Pr. (N. Y. Supreme Ct.) 218, the plaintiffs were manufacturers of pianofortes, under the firm name of "Decker Bros." The defendants were also manufacturers of pianofortes and called theirs the "Decker" piano. A motion for an injunction by plaintiffs was refused on the ground that the name was not employed by defendants for the purpose of deception, or with a view to mislead the public or injure the plaintiff.

In *Meneely v. Meneely*, 62 N. Y. 427; 20 Am. Rep. 489, the plaintiffs were manufacturers of bells at Troy, New York, and stamped upon them "Meneely's, West Troy, N. Y." The

defendants, Meneely and Kimberly, entered into a partnership under the name of "Meneely & Kimberly" for manufacturing bells at Troy, and stamped upon them "Meneely & Kimberly, Troy, N. Y." An injunction against defendants was refused. *Rapallo, J.*, said: "Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, providing he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of the names, the courts will not interfere. A person cannot make a trade-mark of his own name, and thus obtain a monopoly of it which will debar all other persons of the same name from using their own names in their own business."

Lieutenant James had invented a horse blister known as "Lieutenant James' Horse Blister." It was manufactured by himself and he conveyed it to persons in trust for some members of his family. Another person of the name of James, a member of the family, made it after the death of Lieutenant James and sold it under the same name. It was held by the master of the rolls, Lord Romilly, that although that could not be done during the lifetime of Lieutenant James, it could be done after his death. *James v. James*, L. R., 13 Eq. Cas. 421. See the opinion of Lord Justice James in *Massam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748, cited *supra*, this note, where he repudiates the doctrine laid down above.

In *Faber v. Faber*, 49 Barb. (N. Y.) 357, the complainant was the manufacturer of the "A. W. Faber" lead pencil; the defendant, of the "Faber" lead pencil. The relief asked was refused, as each had a perfect right to use his own name in his business, and any injury which the plaintiff had suffered, or might suffer, by such use of the defendant Faber's name merely, must be received as *damnum absque injuria*.

In *Clark v. Clark*, 25 Barb. (N. Y.) 76, the plaintiffs were manufacturers of "Clark's" spool cotton, and on the spools were four concentric circles; the defendant was also the manufacturer of cotton called by his own name, "Clark," and he also used the concentric circles on the end of the spool. It was held

c. FRAUDULENT USE OF A COMPETITOR'S NAME.—Almost any unauthorized use of the name of a rival, will be enjoined. An employé, on leaving a former employer and setting up the same business for himself, will not be permitted to state that he was formerly with his employer, unless authorized to do so, or unless he makes the statement in his publications in such a manner as to avoid all danger of deceiving the public or causing them to fall into the belief, when purchasing from, or employing, him, that they are purchasing from, or employing, his former employer.¹

that the defendant had a perfect right to use his own name, but he should change the concentric circles and the colors.

In *Taylor v. Taylor*, 23 Eng. L. & Eq. 281, the plaintiffs were manufacturers of thread which was marked "Taylor's Persian Thread." The defendant began to mark his thread "Taylor's Persian Thread," and otherwise to imitate the plaintiff's trade-mark. An injunction was granted.

In *Holloway v. Holloway*, 13 Beav. 209, the plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills." The defendant, Henry Holloway, commenced selling pills as "H. Holloway's Pills," put in boxes, etc., similar to the plaintiff's, and with a view of passing off his pills as the plaintiff's. He was restrained by an injunction.

In *Croft v. Day*, 7 Beav. 84, Day, who was the original manufacturer of Day & Martin's Blacking, having died, his executors continued the business. A nephew of Day, named Day, having obtained the authority of one Martin to use his name, sold blacking as of the manufacture of Day & Martin, in bottles, and with labels having a general resemblance to those of the original firm. In granting an injunction against the defendant, Lord Langdale said: "He has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage."

1. *Fullwood v. Fullwood*, 9 Ch. Div. 176. In *Ward v. Ward* (Supreme Ct.), 15 N. Y. Supp. 913, the defendant withdrew from the firm of Marcus Ward & Co., Limited, which was engaged in the

manufacture of linen paper, and established the firm of Wm. H. Ward & Co., engaged in the same business. An action was brought to enjoin defendants from placing the words "Marcus Ward's Son" on their goods, and the expression "Late of the firm of Marcus Ward & Co." on their signs, bill heads, etc. The facts being that defendant was a son of Marcus Ward, and that he was lately a member of the firm named. It was held that plaintiff was not entitled to an injunction.

In *Devee v. Mason*, W. N. 1877, p. 23, the plaintiffs had acquired the right to place the name of "Brand & Co.," on all packets of beef essence. The defendant, one Mason, who had been in the employ of the plaintiff, left and started in business with one Brand, under the name of "Brand & Mason." When proceedings were taken against the defendant he changed the firm name to "Mason & Brand," and shortly afterward Brand refused to stay in the business. It was held that during the continuance of the partnership it was impossible to prohibit entirely the use of the latter's name in business, but not after the retirement of Brand; and defendant, who had an agent in the same street as plaintiff's store, and had over the shop "Agent for Mason & Brand's Essence of Beef," the word agent, being in small letters, and the other being in large letters, was calculated to deceive.

A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or in any way connected with it. It was accordingly held that the defendant Pottage, who set up a shop only a few doors from the plaintiff's shop, and printed over the door the words, "S. Pottage, from

Hookham and Pottage," would be restrained as this course was calculated to deceive the public. *Hookham v. Pottage*, 8 Ch. App. 91.

In *Wolfe v. Barnett*, 24 La. Ann. 97, the plaintiff manufactured his gin in *Holland* and called it "Wolfe's Aromatic Schiedam Schnapps." The defendant manufactured and sold an inferior grade of gin and called it by the same name. An injunction was granted. To the same effect is *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204.

In *Stonebraker v. Stonebraker*, 33 Md. 252, the complainant, Henry Stonebraker, was the manufacturer of various medicines and used certain labels and trade-marks, his name, "Stonebraker," prefacing the name of the medicine. The defendants thereupon fraudulently enjoyed the manufacture of medicines and marked their goods with labels and trade-marks similar to the complainant, they having gotten a brother of the complainant, named Dr. A. S. Stonebraker, to go in partnership in order to use his name. An injunction was granted.

In *Lee v. Haley*, 5 Ch. App. 155, the plaintiffs were the proprietors of "The Guinea Coal Company, at No. 22 Pall Mall." The defendant, who had been their manager, set up a rival business under the name of "The Pall Mall Guinea Coal Company." The court said: "It is a fraud on the part of the defendant to set up a business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person."

Robert Scott and Walter Scott carried on business at Nithsdale Mills, Dumfries, and also at Glasshouse Street, in partnership, under the firm name of R. and W. Scott. By agreement of dissolution, neither party was to use the name of the firm except so far as might be necessary in winding up the affairs. R. Scott made over his business at Nithsdale and Glasshouse Street to the defendants, who at their premises at Glasshouse Street, made use of the inscription, "Scott and Nixon, late R. and W. Scott of N." An injunction was granted restraining them from using that inscription, inasmuch as it amounted to the business of the late firm. *Scott v. Scott*, 16 L. T. N. S. 143.

In *Bininger v. Wattles*, 28 How. Pr. (N. Y. C. Pl.) 206, the plaintiff sold gin called "Bininger's Old London Dock

Gin." The defendants appropriated the plaintiff's name, and also a style of bottle and label resembling the plaintiff's. It was held that their so doing was calculated to deceive and mislead the public, and an injunction was granted.

In *Williams v. Osborne*, 13 L. T. N. S. 498, the defendants, Osborne, Bauer and Cheeseman, had all been employed in different capacities by Robert Hendrie in his business of manufacturing perfumery, and after Hendrie's death they established a business of their own under the style of "Osborne, Bauer and Cheeseman," and printed in large letters over the window of the shop, "Osborne, Bauer and Cheeseman, from the late R. Hendrie." The court held that there was no deception, and an injunction was refused.

In *Southorn v. Reynolds*, 12 L. T. N. S. 575, the plaintiff was the manufacturer of pipes called "Southorn's Broseley Pipes." The defendant procured a person by the name of Southorn from Broseley to make pipes, and stamped on his goods "Reynolds' purified clay pipes, made by Southorn from Broseley." An injunction was granted to restrain defendant from imitating the trade-mark of the plaintiff.

Peterson and Humphrey were in business in Broadway and failed. Each afterwards went into business on his own account, Humphrey at the former store in Broadway, and Peterson in Canal street. Before the failure there was a broad sign over the door, "Peterson & Humphrey," and also one over the second story of the store. Humphrey having refused to remove the signs, an injunction was applied for. Just before the injunction was applied for, the defendant had painted on the sign above the door, "Humphrey & Co.," and the word "formerly," so as to read "Humphrey & Co., formerly Peterson & Humphrey." An injunction was granted against the use of the sign over the second story, but not against the one over the door. *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394.

Shrimpton and Hooper were inventors and manufacturers of needles; and had marked on their packages "Shrimpton and Hooper." Laight, the defendant, was given the privilege by one David Shrimpton Turvey, of using his name; he abridged the name and placed on his packages, "Shrimpton Turvey." An injunction was granted. *Shrimpton v. Laight*, 18 Beav. 164.

d. AGREEMENT BY ONE PERSON TO PERMIT ANOTHER USE HIS NAME.—An agreement by one person to permit another person to use his name will be upheld, provided it is made in good faith, and the name is used without fraudulent intent or deception of the public. The usual cases in which this has occurred are those where a manufacturer or vendor has sold out a factory or place of business and his business, and has at the same time sold the right to use his name as a trade-mark upon goods manufactured. If the contract also specifies that the person selling the right to use his name shall not engage in the same business subsequently and use his name upon his goods, such a contract would be sustained to the extent of enjoining the buyer the name from using his own name upon goods of the same kind as of his own manufacture. But the contract would be strictly construed.¹

Where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the court would not restrain his son from selling a similar article under that name, no fraud being proved; but he was restrained from continuing the use of the words, "late of 107, Strand," and from continuing on the sides of his shop door the plate with the words, "Burgess's Fish Sauce Warehouse, late of 107, Strand." *Burgess v. Burgess*, 3 De G. M. & G. 896.

Lundy, Foot & Co. were manufacturers of snuffs, and the defendant, *A. Lea*, was a workman in their employ. *Lea* left and started in the same business, placing as a showboard over his door, "*A. Lea, late of Lundy, Foot & Co.,*" and also using labels on his canisters, etc., much resembling the plaintiff's. An injunction was refused. *Foot v. Lea*, 13 Ir. Eq. 484.

In *Clark v. Freeman*, 11 Beav. 112, the plaintiff, *Sir James Clark*, was a very eminent physician, practicing in London, and physician in ordinary to Her Majesty. He had devoted especial attention to the treatment of consumptive diseases. The defendant, *Freeman*, a chemist and druggist in the neighborhood of London, had recently been offering for sale and extensively advertising certain pills, which he called "*Sir J. Clark's Consumption Pills.*" An injunction was refused by the master of the rolls, *Lord Langdale*.

In *Rogers v. Nowill*, 5 C. B. 109; 57 E. C. L. 111, the plaintiffs were manufacturers of cutlery, and used their name as a trade-mark. The defendants manufactured and sold cutlery with the plaintiff's trade-mark printed on their

goods. It was held that an action on the case would lie against the defendants.

1. *Probasco and Oakes* manufactured and sold candies under the name "*Oakes' Candies.*" *Oakes* sold to *Probasco*, including in the bill of sale the right to use his name. *He* then entered the employ of *Probasco*, and continued therein for several years, superintending the making of the candies, during which time *Probasco* devised and used a trade-mark consisting of two oak trees, with the words "*Oakes' Candies.*" printed across them. *Oakes* subsequently quit *Probasco's* service, and several years later *he* reentered and sold the business, together with the right to use the trade-mark. *Oakes* applied for an injunction to restrain *Probasco* from using the name, which was refused, as defendants had no right to use the name, having acquired it by legal transfer from their predecessors. *Oakes v. Tonsmierre*, 11 Rep. 447.

The property of *Fish Bros.*, manufacturers, passed by successive changes until it was known as the *Fish Bros. Wagon Company*. The brothers remained in the business, and became directors and officers of the new company. During all that time the products were advertised under the trade-marks, "*Fish Bros., Fish Wagons,*" etc. Several years after the organization of the company, the brothers withdrew therefrom, and set up on their own account, under the name of *Fish Bros. & Co.* In an action on the corporation against *Fish & Co.*, it was held that the plaintiff was entitled to the good-will of the business, in the right to use the *Fish* trade

c. CORPORATION NAMES.—Corporations, being artificial legal entities, having no other personality than that created by their organization, the whole identity of the corporation resides in its name. It is that by which it exists. The names of corporations, as a general rule, are peculiar and somewhat arbitrary, and there is no necessity for one corporation adopting the same name as another. To do so, therefore, is generally a strong indication of an intention to defraud the first user of the name, and gives rise to a great danger of deception of the public. The remedy for such a condition of affairs is so easy that the courts will not often hesitate to require a corporation to change its name, if it is too much like that of a rival who complains. This rule, however, is subject to the limitation that even a corporation in its corporate name cannot so monopolize the name of a common article, such as

Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546.

Jones having succeeded to the business of Nathan Winslow, who was in the canning business and used as a trade-mark "Winslow's Green Corn," and other marks, sold his manufacturing establishment, good-will, trade-marks, etc., to the use of which Symonds and another eventually became entitled. Jones subsequently engaged in the same business and commenced using the same trade-mark. He was restrained by injunction. *Symonds v. Jones*, 82 Me. 302.

Where one Le Page sells his right to manufacture and sell "Le Page's Liquid Glue," and then commences a new business and manufactures "Le Page's Improved Liquid Glue," he will be restrained by injunction. *Russia Cement Co. v. Le Page*, 147 Mass. 206. See also *Le Page Co. v. Russia Cement Co.*, 51 Fed. Rep. 941.

Frazer was the manufacturer of an axle grease called "Frazer's Axle Grease." He sold his business and the right to use his name to others, who incorporated a company called "The Lubricator Company." Frazer soon after made a new grease and took out a patent on it, and called it "Superior Axle Grease," made by Frazer & Co. An injunction was granted restraining him, etc. *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147.

In *Sawyer v. Kellogg*, 7 Fed. Rep. 720, the complainant was the manufacturer of blueing, and used as a label "Sawyer's Crystal Blue and Safety Box." The defendant, Kellogg, manufactured a similar article and used as a label, "Sawin's Soluble Blue and Pep-

per Box," having hired from a man named Sawin the right to use his name. An injunction was granted.

In *Kidd v. Johnson*, 100 U. S. 617, the appellee, having purchased the trade-mark "S. N. Pike's Magnolia Whiskey," was held entitled to restrain others from using the same.

Three brothers by the name of Rogers became associated with the petitioners in the manufacture of plated spoons and forks, using as their trade-mark "1847, Rogers Bros. A. 1." The respondent, Parker, acquired the right from other persons named Rogers, to stamp that name on plated spoons and forks manufactured by himself and them, and stamped the goods so manufactured "C. Rogers Bro. A. 1" and "C. Rogers & Bros. A. 1." It was held that the petitioners were entitled to an injunction restraining the further use of the respondents' marks, as they were calculated to deceive. *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 114.

Hallett sold the use of his name to Cumston, and Cumston manufactured pianofortes marked "Hallett & Cumston." On Cumston's death, his son continued to manufacture pianofortes with the same mark. Hallett forbade him to use his name, and Cumston's son replied that he had bought from another person named Hallett the right to use his name. It was held that Hallett could not maintain a bill in equity against Cumston's son setting forth these facts, either to restrain the use of "Hallett & Cumston," as an infringement of a trade-mark, or to restrain the use of his name, unless it was shown that the defendant used the name of

Goodyear's India Rubber, as to prevent another company from employing the same words as a part of its name.¹

7. Names of Publications.—The names of publications may be protected as trade-marks,² provided they are to some extent

Hallett with intent to represent it to be the name of the plaintiff, and thereby to defraud and injure him. *Hallett v. Cumston*, 110 Mass. 29.

1. In *Koehler v. Sanders*, 122 N. Y. 65, the court held that there could be no exclusive proprietary interest in the use of the words "International Banking Company," which was the firm name of a partnership concern dealing in foreign government bonds, because they were purely descriptive of the business conducted.

In *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, it was held that the words "Goodyear Rubber Company" would not be protected as a corporate name. Field, J., said: "Names which are thus descriptive of a class of goods cannot be exclusively appropriated by anyone. The addition of the word 'Company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or sell them."

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, the plaintiff was incorporated in 1871 as the "Celluloid Manufacturing Company." The defendant was incorporated in 1886 by the name of the "Cellonite Manufacturing Company." An injunction was granted against the defendant corporation. Bradley, J., said: "The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainants, is subject to the same rules of law as if it were the name of an unincorporated firm or company." See also *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712.

In *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286, it was held that a corporation, as well as a private individual, is entitled to have its trade-mark, and may sue for its infringement. The words "Insurance Oil" were accordingly held to be a valid trade-mark.

The use of a label, bearing the words

"The Best Brewing Co.," or "The Best Brewing Co.'s Export Beer," may be restrained at the suit of the Philip Best Brewing Company, who uses similar labels. *U. S. v. Roche*, 1 McCrary (U. S.) 385.

"The Rubber Comb and Jewelry Company," although the corporate name of the defendant, is an infringement of the plaintiff's trade-mark, "India Rubber Company," and will be restrained. *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 258.

In *Holmes v. Holmes, etc., Mfg. Co.*, 37 Conn. 278; 9 Am. Rep. 324, the petitioners were organized under the joint-stock laws of this state, by the name of "Holmes, Booth & Haydens," for the purpose of manufacturing and dealing in brass and other metal goods. Some years afterward a corporation was formed called "The Holmes, Booth & Atwood Mfg. Co.," some of the stockholders of the first having gone into the second. The defendant corporation was restrained from using its name. Carpenter, J., said: "That any name, symbol, or device adopted by an individual, corporation, or business firm, for the purpose of designating the origin and ownership of goods manufactured by them, will be protected as a trade-mark, is well-settled law. The name of a corporation or partnership, accomplishing the same object, will be protected upon the same principle."

The corporate name, "The Oregon Central Railway Company" is a valid trade-mark. *Newby v. Oregon Cent. R. Co., Deady* (U. S.) 609. *Deady, J.*, saying: "The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy, deserves the same consideration and protection from a court of equity. Under the law, the corporate name is a necessary element of the corporation's existence; without it a corporation cannot exist." See *London, etc., Assur. Soc. v. London, etc., L. Ins. Co.*, 11 Jur. 938.

2. In *Munro v. Tousey*, 129 N. Y. 38, Gray, J., said: "The question, then, which we have actually presented, is

whether, by the appropriation and use of the name 'Old Sleuth' to designate his serial publications of detective stories, the plaintiff has acquired a property right in the word 'Sleuth,' which the law will protect against the use of by others in entitling works of fiction. I think we cannot agree with the court below in such a view. There is no proof to support a finding of an intention on the part of the defendant to defraud the plaintiff, or the public, except as it may be inferred by the court from the mere use of the name 'Sleuth.' . . . That the plaintiff would be entitled to the protection of the law against the use by others of the words 'Old Sleuth Library,' as used to describe a series of publications, or against the use of the name 'Old Sleuth, the Detective,' for a work of fiction, may be conceded." It was held, finally, that defendant, the publisher of "New York Detective Library," could not be enjoined at the suit of plaintiff, publisher of "Old Sleuth Library," from selling books containing the word "Sleuth" in their titles.

In *W. J. Johnston Co. v. Electric Age Pub. Co.* (Supreme Ct.), 14 N. Y. Supp. 803, "The Electrical Age," the title of a publication, was held not a sufficient infringement of "The Electrical World" to grant an injunction.

In *Forney v. Engineering News Pub. Co.* (Supreme Ct.), 10 N. Y. Supp. 814; 57 Hun (N. Y.) 588; *Cox's Man. of Trade-Mark Cases* 679, "Engineering News and American Railway Journal" was held to be no infringement of "The Railroad and Engineering Journal," Beach, J., saying: "The principle is that there must be an adaptation of plaintiff's title, either exact or to an extent sufficient to show an appropriation of words producing similitude in the title themselves, or from well-established popular designation."

In *Munro v. Smith*, 55 Hun (N. Y.) 419; 8 N. Y. Supp. 671; *Cox's Man. of Trade-Mark Cases* 711, Van Brunt, P. J., said: "This action was brought to restrain by injunction, the use of a certain picture, as well as the phrase 'Old Sleuth, the Detective,' or the word 'Sleuth.' Upon the trial it was held that the plaintiffs were not entitled to the exclusive use of the name 'Old Sleuth,' and that the defendants were entitled to its use. The court also held that the picture of Old Sleuth upon the first number of the 'Old Sleuth Library,' published by the plaintiff, was a

trade-mark of the plaintiff, and that he had the exclusive right to the use of such picture; and that the acts of the defendants in publishing the said picture constituted an infringement of the plaintiff's trade-mark. . . . The main question presented, then, is: Had the plaintiff a trade-mark in the said picture? . . . We fail to see upon what theory a trade-mark can arise out of the circumstances which are here mentioned. . . . The picture or design which appeared as the frontispiece of the first story published, never was attached to any other book or story, but in all instances was used as a frontispiece for the same book or story, and seems only to have been an illustration of that particular story. It never was used in connection with the subsequent numbers of the said library or any other stories, except, as has already been stated, in pictorial illustrations, in which this same character appeared in connection with different characters, objects and scenes. . . . We cannot see that upon any principle which governs the rights of parties to trade-marks the plaintiff can establish a trade-mark in illustrations in a book or story which he publishes. That must be protected by copyright, if at all."

In *Borthwick v. Evening Post*, 37 Ch. Div. 449, it was held that the "Evening Post," was not a sufficient infringement of "The Morning Post," to entitle plaintiffs to an injunction.

In *Estes v. Leslie*, 29 Fed. Rep. 91; 182 P. & S., it was held that "Chatter Book" was an imitation and infringement of "Chatter Box," both books being gotten up in the same style and both juvenile publications. See also *Estes v. Leslie*, 27 Fed. Rep. 22; *Estes v. Williams*, 21 Fed. Rep. 189; 139 P. & S.; and *Estes v. Worthington*, 31 Fed. Rep. 154.

In *Duniway Pub. Co. v. Northwest Printing, etc., Co.*, 11 Oregon 322, it was held that the title "The Northwest News" was no piracy of the title "The New Northwest." No fraud was alleged. Waldo, J., said: "But in such case (*i. e.*, absence of fraud), the title of the defendant's paper must so closely simulate that of the plaintiff's that an infringement may be declared by the court as matter of law, or else the simulation must be proven as a fact."

In *Potter v. McPherson*, 21 Hun (N. Y.) 559; 62 P. & S., "Independent National System of Penmanship" was held to be an infringement of "Payson,

Dunton, and Scribner's National System of Penmanship." Daniels, J., said: "In order to render it necessary that a publication or imitation of this nature should be restrained, it is sufficient that persons who may desire to purchase the plaintiffs' publication, might very well accept that of the defendants, supposing and believing it to be the same. That the difference might be readily detected by a comparison of one book with the other, is not sufficient to allow the defendants to appropriate and use the plaintiffs' title. If, in its use, persons under ordinary circumstances, desiring to purchase one, would receive the other in its place, believing that they had obtained the work intended to be bought, that will not only justify, but require the court to interfere, for the purpose of preventing the use of the plaintiffs' title."

In *Robinson v. Berry*, 50 Md. 591, Miller, J., said: "A publisher or author has, either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade-mark, and may, like a trader, claim the protection of a court of equity against such a use or imitation of the name, marks, or designation, as is likely, in the opinion of the court, to be a cause of damage to him in respect of that property."

In *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 51 How. Pr. (N. Y. Supreme Ct.) 402; *Cox's Man. of Trade-Mark Cases* 503, following *Snowden v. Noah, Hopk. Ch. (N. Y.)* 347; 14 Am. Rep. 547, it was held that "The Grocer" was no infringement of "The American Grocer." But see *American Grocer Pub. Co. v. Grocer Pub. Co.*, 25 Hun (N. Y.) 398, where Brady, J., said: "The recent determinations of the court of appeals seem to place the right to protection upon the infringement of the proprietary right acquired by the use of a symbol, or figure, or letter, or other form of device or name. . . . And in the more recent case of *Hier v. Abrahams* (82 N. Y. 524), the court said: 'But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it in any style of print, or on any form of label, and its use by another in any form is unlawful.'" Speaking of some recent French cases, the judge continued: "It was held that the title of a journal is property. . . . The

judgment declares that the title of a journal is the exclusive property of its founder, and to give to a new journal the title already belonging to another would be a usurpation of property. . . . In the *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321, it was said: 'The name of a newspaper is a trade-mark, as much so, as a label stamped upon a bale of muslin.' See also *Cox's Man. of Trade-Mark Cases* 679."

In *Talcott v. Moore*, 6 Hun (N. Y.) 106; *Cox's Man. of Trade-Mark Cases* 478, it was held that "The Red and White Book" was too dissimilar from "The Title Red Book, New Scenes, 1875" to grant an injunction, even when there was an apparent attempt to deceive. Daniels, J., said: "The points of difference are so prominent and striking, as at once to produce the impression that both the medicines and the books are different productions. . . . The rule upon this subject is practically the same as that applied for the protection of trade-marks, where, in order to maintain an action for an injunction, it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived."

In *Stephens v. De Conto*, 4 Abb. Pr. N. S. (N. Y. Super. Ct.) 47; 7 Robt. (N. Y.) 343; *Cox's Man. of Trade-Mark Cases* 295, it was held that "El Cronista" was no infringement of "La Cronica," the one meaning "the chronicler," the other "the chronicle." Monell, J., said: "I do not mean to say that a newspaper proprietor cannot appropriate, and, by long use, acquire a property in a name, which the courts will protect against piracy. . . . But that I understand to be the extent of the rule, and that any mere assimilation of the name—unless it was very clearly calculated to deceive the public—would not be unlawful."

In *Matsell v. Flanagan*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 459, the publishers of the "National Police Gazette" complained of a publication called the "United States Police Gazette," and an injunction was granted. The court, by Brady, J., said: "It may be conceded that the plaintiffs have no exclusive right to the name which they have adopted for their paper; that in the words used by them no person has any exclusive proprietary interest; that they belong to the language of the country, and may be em-

ployed in any way or for any purpose which will not defraud individuals or deceive the public. The courts, in exercising the power which they possess of restraining the use of another's trademark, symbol, name or design, do not confine their interference to names, symbols, marks or designs, originating with the person first using them, and intended either to describe a quality assumed to be a distinguishing one of the goods manufactured or the thing created, or to distinguish the particular manufacture from others. The enforcement of the doctrine that trade-marks shall not be simulated, does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such manner as may deceive them, by inducing or leading to the purchase of one thing for another. . . . There is neither honesty nor honorable competition in adopting, for a similar purpose, a name used by another, if it be employed in such a manner that the public may be imposed upon; and such a result must follow if the simulation be so successful that one article or creation is purchased or accepted for another. . . . The following are cited for illustration : *Craft v. Day*, 7 Beav. 84; *Hogg v. Kirly*, 8 Ves. 214; *Knott v. Morgan*, 2 Keen 219; *Crawsbay v. Thompson*, 4 M. & G. 357; 43 E. C. L. 189; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Lemonie v. Ganton*, 2 E. D. Smith (N. Y.) 343; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Partridge v. Menck*, 2 Sandf. (N. Y.) 622; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1. A newspaper establishment is not excluded from the advantage of these rules. It is a species of property, and the rights which appertain to it, so far as they are private and exclusive, are entitled to the protection of the laws. The title of a newspaper may be a purely original one, and the proprietor, for that reason, entitled to its exclusive use. He may create a word, or combination of words, for the particular designation of his paper, and in that way acquire an exclusive right to the use of the name employed. He may combine, as the plaintiffs have, well-known English words in common use to designate his paper, and its contents may, in many re-

spects, be multiplied by publications in other prints, but the paper will, nevertheless, be original in some, if not in many respects."

In *Snowden v. Noah*, Hopk. Ch. (N. Y.) 347; 14 Am. Dec. 547; *Cox's Man. of Trade-Mark Cases* 41, it was held that "The New York National Advocate," was no infringement of "The National Advocate," there being no attempt to deceive.

In *Bell v. Locke*, 8 Paige (N. Y.) 75; 34 Am. Dec. 371; *Cox's Man. of Trade-Mark Cases* 65, "The New Era," was held to be no infringement of "The Domestic Republican New Era."

"The right which exists in the title of a publication is a right of property, *Clement v. Maddick*, 1 Giff. 98; *Kelly v. Hutton*, L. R., 3 Ch. 708; a chattel interest, *Kelly v. Hutton*, capable of assignment, *Longman v. Tripp*, 2 Bos. & P. N. R. 67; *Ex p. Foss*, 2 De G. & J. 230; *Kelly v. Hutton*, L. R., 3 Ch. 708; *Clowes v. Hogg*, W. N. (1870), p. 268; W. N. (1870), p. 40; *Ward v. Beeton*, L. R., 19 Eq. 207; *Snowden v. Noah*, Hopk. Ch. (N. Y.) 347; 14 Am. Dec. 547; *R. Cox* 1; by request, *Keene v. Harris*, 17 Ves. 338; *McCormick v. McCubbin*, Ct. Sess. Cas., 1st Ser., I. 541 (new ed. 496); one-half a share could be sold by the executor of the owner thereof, passing in the event of its proprietor's bankruptcy, to his trustee, but incapable of seizure by the sheriff, *Ex p. Foss*, 2 De G. & J. 230; and which, in the event of the dissolution of a partnership between joint proprietors, must be sold for the purpose of the proceeds of the sale being included in the assets of the partnership. *Bradbury v. Dickens*, 27 Beav. 53; *Dayton v. Wilkes*, 17 How. Pr. (N. Y. Super. Ct.) 510; *R. Cox* 224." *Sebastian on Trade-Marks* 266.

"In all such cases the plaintiff must, of course, show that deception is probable, or he cannot succeed in obtaining the relief he seeks." *Sebastian on Trade-Marks* (2d ed.) 245.

In *Walter v. Head*, 25 Sol. J. 742, 757, at the suit of plaintiffs, proprietors of "The Times" newspaper, the defendant was enjoined from publishing any paper of the same name.

In *Corns v. Griffiths*, W. N. (1873), p. 93; *Cox Man.* 420, "The Iron Trade Circular" (edited by Samuel Griffiths), was restrained by injunction at the suit of plaintiff, publisher of "The Iron Trade Circular" (Rylands).

In *Mack v. Petter*, L. R., 14 Eq. 431; 41 L. J. Ch. 781; *Cox's Man. of Trade-Mark Cases* 403, it was held that "The Children's Birthday Text Book" was an infringement of "The Birthday Scripture Text Book." Lord Romilly, M. R., said: "The defendants would be at liberty to publish a Daily Text Book, and so far to adopt the scheme of the plaintiff's work; but it was the plaintiff's own idea to have a text book associated with a birthday, and so to adapt it to those sentiments of religion with which most persons regard a day which marks the completion of another year of their lives. The plaintiff is entitled to a copyright in the use of the title, 'Birthday Text Book,' whatever other words may be associated with it, and the defendants must be restrained from the publication of their work, and they are not entitled to publish a work with such a title, or in such a form, as to binding or general appearance, as to be a colorable imitation of that of the plaintiff."

In *Clowes v. Hogg*, W. N. (1870) 268; L. J. Notes of Cases (1870) 267; W. N. (1870) 40, a publication called "English Society" was enjoined, on the ground of being a fraudulent imitation and continuation of "London Society," the magazine of the plaintiff.

Bradbury v. Beeton, 21 L. T. N. S. 323, was a suit by "Punch" to restrain "Punch and Judy." Malins, V. C., said: "The principle is clear that you cannot adopt a trade-mark or use a name, calculated to mislead or deceive persons as to an article, already appropriated, into the belief that they are purchasing one thing when they are purchasing another. On the whole, I come to the conclusion that this publication is not calculated to mislead the ordinary run of mankind, who are alone to be considered. The court does not legislate for the careless class, who know not what they are purchasing. The word Punch is well known, and it is impossible that an ordinary person can be misled."

In *Kelly v. Hutton*, L. R., 3 Ch. 703; *Cox's Man. of Trade-Mark Cases* 292, Sir W. Page Wood, L. J., said: "Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman v. Tripp*, 2

Bos. & P. N. R. 67, and *Ex p. Foss*, 2 De G. & J. 230."

In *Ingram v. Stiff*, 5 Jur. N. S. 947, an injunction was granted to restrain the defendant from printing, publishing, or selling any newspaper or other periodical, under the name of "The London Journal," or under any other name or style of which the words "London Journal," should form a part, and from doing or committing any act or default that might tend to lessen or diminish the sale or circulation of the plaintiff's periodical called the "The London Journal." The defendant's Journal was called "The Daily London Journal." In the court of appeals, October 1st, 1839, the injunction was continued, but was doubted, and the court suggested that defendant call his paper, "The Daily Journal."

In *Clement v. Maddick*, 1 Giff. 98; 5 Jur. N. S. 592; 33 L. T. 117, the plaintiffs, being the publishers of a paper called "Bell's Life in London," the defendants were restrained from publishing a paper entitled "The Penny Bell's Life and Sporting News," or any paper the name of which shall contain the words "Bell's Life." Stuart, V. C., said, for the court, that he considered the application in the light of one to support a right to property; that the defendants had contended that for the plaintiffs to support their claim to relief they must prove a fraudulent intention on the part of the former. But Lord Cottonham, in *Millington v. Fox*, 3 Myl. & C. 338, had expressed a totally different opinion, to the effect that when a trade-mark had been made use of, even innocently and conscientiously, to the injury of another, that party was entitled to the interference and protection of the court.

In *Prowett v. Mortimer*, *Cox's Man. of Trade-Mark Cases* 141; 2 Jur. N. S. 414; 27 L. T. 132; 4 W. R. 519, the defendant, the owner and publisher of "The Britannia" newspaper, sold it to the plaintiff, who combined it with another paper, "The John Bull," calling the two "The John Bull and Britannia." Defendant began the publication of a new paper, "The True Britannia," purporting it to be a continuation of "Britannia." It was held to be an infringement, and an injunction was granted.

In *re Edinburgh Correspondent Newspaper* (July 4th, 1822), Ct. of Sess. Cas., 1st Ser., I. 541 (new ed. 496); *Cox's Man. of Trade-Mark Cases* 34, an injunction was granted at the

arbitrarily selected, and do not describe the geographical location of the place of publication, or the author,¹ or the subject-matter, so closely as to give others a right to use the name with equal

suit of the plaintiffs, publishers of the above paper, to restrain the publication of a paper of the same name.

In *Spottiswoode v. Clarke*, 2 Ph. 154; 1 Coop. C. C. 254; 10 Jur. 1043; 8 L. T. 230-271; Cox's Man. of Trade-Mark Cases 85, it was held that "Old Moore's Pictorial Almanack" was not sufficiently similar to "The Pictorial Almanack" to grant an injunction. It was held, also, that no exclusive right to the use of a descriptive word, such as "Pictorial" or "Illustrated," could be gained, but there might be a combination of such with other words.

In *Edmonds v. Benbow*, Cox's Man. of Trade-Mark Cases 33; Seaton (3d ed.) 905 (4th ed.) 238, the title "The Real John Bull" was held to be an infringement of "The Old Real John Bull."

In *Chappell v. Davidson*, 2 K. & J. 123, defendants were restrained from printing a song entitled "Minnie, dear Minnie," with the title-page containing a picture of Madame Anna Thillon and her name beneath, for it was held that this was an obvious imitation of plaintiff's song "Minnie," sung by Madame Anna Thillon, and likely to deceive the public. See also *Chappell v. Sheard*, 2 K. & J. 117, where defendant was enjoined from selling another imitation of plaintiff's song, "Minnie," under the name "Minnie Dale, sung by Madame Thillon at Julien's Concerts, etc."

In *Hogg v. Kirby*, 8 Ves. 215, defendants were enjoined from publishing the "Wonderful Magazine, New Series Improved," a continuation of plaintiff's work, the "Wonderful Magazine." It was said by Chancellor Eldon: "It is equally competent to any other person, perceiving the success of such a work, to set about a similar work, *bona fide* his own; but it must be in substance a new and original work; and must be handed out to the world as such. . . . Most of the cases have been, not where a new work has been published as part of the old work, but where, under color of a new work, the old work has been republished and copies multiplied. . . . I shall state the question to be, not whether this work is the same, but, in a question between these parties, whether the defendant has not represented it to be the same."

1. An author's *nom de plume* is not sufficient to constitute *per se* a trade-mark. *Clemens v. Belford*, 14 Fed. Rep. 728; 114 P. & S.; Cox's Man. of Trade-Mark Cases 685. *Blodgett, J.*, said: "The bill rests, then, upon the single proposition: Is the complainant entitled to invoke the aid of this court to prevent the defendants from using the complainant's assumed name of 'Mark Twain' in connection with the publication of sketches and writings which complainant has heretofore published under that name, and which have not been copyrighted by him?"

. . . The invention of a *nom de plume* gives the writer no increase of right over another who uses his own name; . . . but an author cannot, by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law in force in this country, that the 'publication of a literary work without copyright is a dedication to the public, after which anyone may republish it.'

In *England v. New York Pub. Co.*, 14 P. & S.; 8 Daly (N. Y.) 375, *Daly, C. J.*, said: "It is well settled, as a general proposition, that a person has the legal right to use his own name to designate an article produced and sold by him, although another person of the same name has previously manufactured and sold the like article with the same designation. *Burgess v. Burgess*, 17 Jur. 292; 22 L. J. Ch. 275; 17 L. & Eq. 257; *Meneely v. Meneely*, 1 Hun (N. Y.) 367; *Wolfe v. Burke*, 7 Lans. (N. Y.) 156. *Faber v. Faber*, 49 Barb. (N. Y.) 359; *Browne on Trade-Marks*, §§ 205, 423. This rule, however, does not hold good where there is evidence of fraud on the part of the defendant, and danger of deceiving the public. *Stonebraker v. Stonebraker*, 33 Md. 268; *Holloway v. Holloway*, 13 Beav. 209; *Croft v. Day*, 7 Beav. 84; *Roger v. Nowill*, 5 M. G. & S. 109; 57 E. C. L. 111. The right of a son who has learned to manufacture a particular article in his father's service, to affix his name to an article of the same kind when engaged in business for himself, is distinctly recognized in two of the cases that have been cited (*Burgess v. Burgess*, 17 Jur. 292; *Meneely v. Meneely*, 1 Hun (N. Y.) 367), however

truth. They will not be protected if the publications to which they are applied have been copyrighted and the copyright has expired.¹

detrimental it might be to the father's business. . . . This case does not even go as far as this. It is the publication of a newspaper, different in its special character from those published by the plaintiff, and which by its title, denotes that it is published, not by the father, but by the son." See PARTNERSHIP, vol. 17, p. 824.

"Mark Twain" agreed with a publisher to allow him to publish one of his essays in a book of selection, and sent him a number from which to select, which had been published but not copyrighted. The publisher published all of the essays, and also another, alleging in the advertisement and title-page that all were by "Mark Twain," which was the *nom de plume* of the plaintiff. An injunction was granted restraining the defendant from using the name "Mark Twain" in any manner other than as provided by the agreement. *Clemens v. Such* (N. Y. Sup. Ct.), Codd. Dig. 312; *Cox's Man. of Trade-Mark Cases* (1st ed.) 429.

In *Archbold v. Sweet*, 1 M. & Rob. 162, L. Tenderden, C. J., said: "Plaintiff, author of law book, sold copyright and edited second edition, but refused to edit third edition. Publisher put out a third edition bearing name of author, as if he had edited third edition. Third edition contained errors which were prejudicial to author. Injunction granted to restrain publisher from issuing third edition with any statement which would lead public to suppose that it was edited by author."

A publisher advertised for sale certain poems which were represented to be by Lord Byron. An application for injunction was made by friends of Lord Byron, who was abroad. It was granted because the publisher would not swear that the poems were by Lord Byron. *Byron v. Johnston*, 2 Meriv. 29.

1. In *Merriam v. Texas Siftings Pub. Co.*, 48 Fed. Rep. 944, Shipman, D. J., said: "The plaintiffs are not entitled to an exclusive use of the name 'Webster's Dictionary' upon copies of editions, the copyrights of which have expired, for the name is not a trade-mark. Mere copies of the edition of 1847 and 1859 can be reproduced by a publisher, over his own name, provided he makes no misrepresentations to induce the public

to believe that it is another book, the right to publish which is the exclusive property of the plaintiff. The mere form or size of the volume in which Webster's Dictionary has ordinarily appeared, does not, in the mind of the public, connect the plaintiff's with the manufacture of the dictionary, and there is no characteristic of a trade-mark in such ordinary form or size."

In *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411, the court, by Thayer, J., said: "I have no doubt that defendant is entitled to use the words 'Webster's Dictionary' to describe the work that it is engaged in publishing and selling. Those words were used to describe Webster's Dictionary of the edition of 1847, and, as the copyright on that edition has expired, it has now become public property. Anyone may reprint that edition of the work, and entitle the reprint 'Webster's Dictionary.' The latter words, which appeared on the title-page and on the outer cover of books of the edition of 1847, have become public property, as well as other parts of the work. . . .

In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter-heads and bill-heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark."

A novel called "Trial and Triumph," was first published in 1854 by the plaintiff's assignor, and subsequently in 1860. It was then, for a long time, suffered to remain out of print. In 1875, the defendant published a novel under the same name. It was held that the sale of the latter would be enjoined, the plaintiff not being disentitled to relief by the fact of having allowed his rights to lie dormant. In this case the court, by Malins, V. C., said, *inter alios*—"The title of the book is part of the book; you cannot read any book, or turn over the title-page, without finding that the title is at the commencement of the book, that it is part of the book, and it is as much the subject of copyright as the book itself. . . . Would anyone be entitled to publish a book called

8. Trade Name as Applied to Business Stand; Signs.—It is very well established that a trade name or sign, which is not technically a trade-mark, will receive protection from the courts,¹

'Vanity Fair,' leaving out the author's name? A person buying the cheap edition would expect to get Thackeray's work, and what a fraud it would be if he had got some spurious thing which was not worth reading." *Weldon v. Dicks*, 10 Ch. Div. 247; 39 L. T. N. S. 467; *Cox's Man. of Trade-Mark Cases* 638. It is thought that this case must rest upon the ground that the copyright had not expired. But see *Cox's Man. of Trade-Mark Cases* 685, note.

In *Metzler v. Wood*, 8 Ch. Div. 608; 47 L. J. Ch. 625; 38 L. T. N. S. 541; 26 W. R. 577, it was held that "Henry's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor" was an infringement of "Henry's Royal Modern Tutor for the Pianoforte," the former being a revised edition of Jousse's work, but with Henry's name in large letters and hence liable to deceive.

See *Osgood v. Allen*, 1 Holmes (U. S.) 185, where it was held that "Our Young Folks' Illustrated Paper" was no infringement of "Our Young Folks: an Illustrated Magazine for Boys and Girls," and no injunction was granted without proof of actual deception. Shipley, J., said: "No case can be found, either in *England* or in this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate."

In *Jollie v. Jaques*, 1 Blatchf. (U. S.) 627, Nelson, J., said: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident."

1. In *Saunders v. Jacob*, 20 Mo. App. 96, the plaintiff was proprietor in St. Louis, of the "New York Dental Rooms." Defendant opened a dental office near plaintiff, calling it "Newark Dental Rooms." An injunction was granted, and the defendant appealed. The court, by Thompson, J., said: "To justify an injunction in such a case, it should appear that the resemblance between the two trade-marks or trade names is sufficiently close to raise a probability of mistake on the part of the public, or to show a design to mis-

lead and deceive on the part of the defendant. . . . In the present case both of these elements concur. There was sufficient resemblance between the two signs to raise a probability of mistake on the part of the class of customers that frequented the plaintiff's place of business. The evidence further shows that such mistakes actually occurred. It further satisfies us that the defendant intended that they should occur."

"Deception of the same kind will be restrained when the name is a designation of the place at which the business of an individual or firm is carried on, and by which it is known and recognized. Thus, 'Osborne House' (*Hudson v. Osborne*, 39 L. J. Ch. 79); 'The Carriage Bazaar' (*Boulnois v. Peake*, 13 Ch. Div. 513, n), etc. But in such cases the plaintiff must prove that there is something distinctive in the appellation which he has given to his establishment, since no relief can be given him if that appellation is merely descriptive, as 'The Antiquarian Book Store' (*Choynski v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476; *Cox's Man. of Trade-Mark Cases* 336); . . . and he must also prove that the result of the defendant's act is to represent that his business is identical with that carried on by the plaintiff." *Sebastian on Trade-Marks* 240.

"Practically the same law prevails to prevent the use of the name of a place of business, and in these and similar instances it is only necessary for the plaintiff to prove that the defendant's conduct is of such a nature as to be calculated to deceive the public into believing that the defendant's business is the same business as that of the plaintiff." *Slater on Copyright and Trade-Marks* 271.

In *Hoby v. Grosvenor Library Co.*, 28 W. R. 386, plaintiff was the proprietor of a library known as "The Grosvenor Library." Defendant used the name "The Grosvenor Library, Limited," applied to a similar business in the same quarter of the city. An injunction was granted.

In *Boulnois v. Peake*, 13 Ch. Div. 513, n, plaintiffs, who were dealers in carriages, called their store "Carriage Bazaar." Defendant opened a carriage store in

if it is not descriptive,¹ and contains no deceptive words or

the same street, and called it at first "Carriage Repository," then changed this to "New Carriage Bazaar." An injunction was granted.

In *Colton v. Thomas*, 2 Brew. (Pa.) 308, plaintiff, proprietor of the "Colton Dental Association," sued to enjoin defendant, formerly in his employ, from the use of the words "Colton Dental Rooms," preceded in small letters by "formerly operator at the," on his sign. Both offices were on the same street, a few blocks apart. The court, by Allison, J., said: "This case, we think, is clearly within the rule of prohibition. It is difficult to believe that the words 'late operator,' and 'formerly operator,' being in letters and type so much smaller than the other letters upon the cards and sign of the defendant, have not been thus placed with a purpose to mislead and to create an impression that his rooms are the Colton Dental Rooms, or the rooms of the Colton Dental Association. But whether intended to produce this result or not, no one can doubt that they are calculated to mislead the majority of unwary persons, and even of the most wary and cautious, when suffering from acute pain and seeking for immediate relief."

In *Walker v. Alley*, 13 Grant's Ch. (U. C.) 366, plaintiff was the proprietor of a clothing store called "The Golden Lion," on the front of which was displayed the figure of a lion. Defendant, formerly in the plaintiff's employ, opened near by a clothing shop of his own, calling it "The Golden Lion," with a figure similar to the lion of the plaintiff. An injunction was issued to restrain defendant. See also *McCardel v. Peck*, 28 How. Pr. (N. Y. Supreme Ct.) 120.

In *Woodward v. Lazar*, 21 Cal. 449; 82 Am. Dec. 751, plaintiff had been the lessee of a house which he had used as a hotel and called the "What Cheer House." Subsequently, he built another hotel, for a while running both under the same name, but transferring the principal sign to the new house. Finally the business in the first house was entirely discontinued, and the house vacated for a period of three months. Defendant afterwards leased the first house and opened a hotel under the name of "Original What Cheer House," the word "original" being in small letters. An injunction was granted. The

court, by Norton, J., said: "Conceding that the name of a hotel must pertain to some particular house, or be the trade-mark of the person as the keeper of a particular house, it does not follow that the name becomes inseparably connected with the building to which it was first applied. The name is not a 'fixture.' A person may have a right, interest, or property, in a particular name, which he has given to a particular house, and for which house, under the name given to it, a reputation and good-will may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not thereby make the name a fixture to the building, and transfer it irrevocably to the landlord."

In *Marsh v. Billings*, 7 Cush. (Mass.) 332; 54 Am. Dec. 723, plaintiffs and the proprietor of the Revere House, made a contract for the conveyance of persons between the railroad station and the hotel, whereby the plaintiffs were authorized to put on their coaches and the hats of their hackmen, "Revere House." A similar arrangement had existed between the hotel proprietor and defendants, but had terminated by mutual consent. Defendants still continued the use of "Revere House" on their coaches, etc., and called "Revere House" at the station. At the suit of plaintiffs, an injunction was granted, restraining the defendants from these misrepresentations. Fletcher, J., said: "This principle is by no means novel in its character; or in its application to a case like the present; it is substantially the same principle, which has been repeatedly recognized and acted on by courts, in reference to the fraudulent use of trade-marks, and regarded as one of much importance in a mercantile community. . . . The ground of action against the defendants is not that they carried passengers to the Revere House or that they had the words 'Revere House' on the coaches, and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of the lessee of the Revere House, in violation of the rights of the plaintiffs."

1. In *Goodyear Rubber Co. v. Good-*

year's India Rubber Glove Mfg. Co., 138 U. S. 598, plaintiffs, incorporated under the name "Goodyear Rubber Co." in 1872, brought suit to restrain defendants, incorporated in 1847 under the name of "Goodyear's India Rubber Glove Manufacturing Co.," from using on their signs, business letters, etc., the abbreviation, "Goodyear Rubber Manufacturing Co." An injunction granted at the trial below was dissolved, the name being only descriptive. Mr. Justice Field, for the court, said: "Goodyear Rubber" are terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. The addition of the word 'Company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them. . . . Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of anyone; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name. . . . The case at bar cannot be sustained as one to restrain unfair trade. . . . There is no proof of any attempt of the defendant to represent the goods manufactured and sold by him as those manufactured and sold by the plaintiff."

In *Armstrong v. Kleinhaus*, 82 Ky. 303; 56 Am. Rep. 894, plaintiff leased a house which was very high, and used it as a clothing store, designating it, with the consent of the landlord who paid half the expense of the sign, "Tower Palace." Plaintiff subsequently removed his business to another store, transferring the sign, without the consent of the landlord, to the new house. The landlord continued the use of the name and leased to defendant, who used the store under the name of "Tower Palace" as a clothing establishment. An injunction was refused. In distinguishing this case from *Woodward v. Lazar*, 21 Cal. 448; 82 Am. Dec. 751, Lewis, J., said: "But conceding the correctness of the conclusion of the court in that case, it does not sustain the claim of appellant. There the name of the hotel was not applicable to or descriptive of a particular building, but was arbitrary, and applied to the business carried on first in the building upon the leased premises and after-

wards in both of the buildings. Here the name 'Tower Palace' was intended to describe and designate the place, and not the particular business, nor the person carrying it on. It never was used as a trade-mark by appellant, but simply to indicate the particular place on Market street where he did business, and consequently he never acquired the exclusive right to use the name, except as applicable to and while he occupied that building."

In *Eggers v. Hink*, 63 Cal. 445; 49 Am. Rep. 96, plaintiff, the proprietor of a saloon in San Francisco, had adopted as a business sign, a row of beer barrels with "P. B.," stamped on the heads, and the words, "Depot of the Celebrated" above, and "Philadelphia Beer" below, the barrels. Defendant in the same city began the use of a similar sign, substituting "F. B." for "P. B.," and "Fredericksburger" for "Philadelphia." The court, in refusing to grant the plaintiff protection, said: "A sign placed over a man's place of business with a row of beer barrels painted on it would indicate that he sold beer; the letters 'P. B.,' stamped on the head of the barrels, and the words 'Depot of the Celebrated,' placed above, and the words 'Philadelphia Beer,' placed below, the row of barrels, would indicate that he sold Philadelphia beer. It does not appear that the plaintiff is the manufacturer of the Philadelphia beer, nor the sole agent for its sale. For aught that appears, anyone else has as much right to sell Philadelphia beer as the plaintiff. In our opinion, the sign and label of the plaintiff relates only to the description of the beverage dealt in by him, and therefore cannot be protected as a trade-mark." See also *Civil Service Supply Assoc. v. Dean*, 13 Ch. Div. 512.

In *Gray v. Koch*, 2 Mich. N. P. 119, plaintiff and defendant were dealers in ready-made clothing, and had adjoining stores. Plaintiff began to designate his store as "Mammoth Wardrobe," and put up such a sign. Defendant did the same, and plaintiff sued. An injunction was denied, as the words were only descriptive of the plaintiff's store.

In *Choynski v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476; *Cox's Man. of Trade-Mark Cases* 336, plaintiff, proprietor of the "Antiquarian Book Store," sought to restrain defendant, also a book dealer, from using the words "Antiquarian Book and Variety Store." An injunction was denied; the term "Antiquari-

meaning,¹ and a rival will be enjoined from conducting the same business in the same locality under the same trade name, while he might be permitted to use the name in a different locality.² A trader will sometimes be enjoined from the use of his

an," being merely descriptive of the nature of the store.

1. In *Lichtenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592, plaintiff, who had designated his place of business as "IXL General Merchandise Auction Store," sued to restrain defendant from using on his sign "Great IXL Auction Co." An injunction was denied.

2. In *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278, defendant purchased from the executors of Joseph Hall the latter's agricultural implement supply store, 10 South Water St., Rochester, N. Y., April, 1869, continued the business under the name of "The Old Joseph Hall Agricultural Works, No. 10 South Water St., Rochester, N. Y." In September, 1869, plaintiffs rented a small store near by in Water St. and began a like business, under the name of "The Glen & Hall Manufacturing Co., No. 10 South Water St., Rochester, N. Y." Plaintiffs sued to restrain defendant from the use of the words "No. 10 South Water St." Dwight, C., in upholding the defendant, said: "The case at bar, properly considered, is a species of 'good-will' analogous to a trade-mark. . . . It is a well-known fact that the 'good-will,' like a trade-mark, is a species of property. . . . It would follow from these principles, that if a person had established a business at a particular place, from which he has derived or may derive, profit, and has attached to that business a name indicating to the public where or in what manner it is carried on, he has acquired a property in the name, which will be protected from invasion by a court of equity, on principles analogous to those which are applied in case of the invasion of a trade-mark."

In *Lee v. Haley*, L. R., 5 Ch. App. 155; *Cox's Man. of Trade-Mark Cases* 325, Giffard, L. J., said: "The case is that the plaintiffs have carried on business in Pall Mall for a series of years under the name of 'The Guinea Coal Co., and there is evidence to show that they were well known, and that, as one would expect, they were frequently spoken of as 'The Pall Mall Guinea Coal Co.'

The defendant, first of all, sets up as 'The Pall Mall Guinea Coal Co.' in Beaufort Buildings. That was not found, and, indeed, was not calculated, to induce persons to deal with him under the supposition that they were dealing with the plaintiffs. All persons, of course, going to Beaufort Buildings would know perfectly well that they were not dealing with the persons carrying on their business in Pall Mall. He then proceeds to set up under the same name in Pall Mall, and and that is the proceeding which is now complained of. It was urged, on behalf of the defendant, that there are a number of other companies who call themselves Guinea Coal Companies, some with prefixes, and others with no prefixes, and that for this, among other reasons, the plaintiffs cannot have any property in the name of the Guinea Coal Co. I quite agree that they have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. The other persons who use the name of 'The Guinea Coal Co.' carry on business in such situations that they are not likely to be mistaken for the plaintiffs; but as regards the use of it by the defendant, there is abundant evidence showing that many persons have been deceived, and when we see exactly what the defendant did, I must emphatically say, that I do not acquit him of an intention to deceive. . . . For these reasons I am clearly of opinion that this injunction was properly granted, and there is no objection to it upon the ground that it is confined to the particular street of Pall Mall; it is quite right that it should be so confined, because in all probability if the same name were used in some other street it would lead to no mistake or deception."

own name, if fraud and an intention to deceive the public be manifest;¹ but unless this appears, the honest and fair use of his name by a trader or manufacturer cannot be enjoined.² Trade names applied to business stands, which are arbitrary or personal, become the personal property of the first adopter and may be transferred by him from one location to another, or sold with his business, independent of the location where it is conducted;³ but if the name is local—that is, derives its origin from any local

In *Croft v. Day*, 7 Beav. 84, plaintiffs, executors of Charles Day, surviving partner of the well-known firm of Day & Martin, blacking manufacturers, 97 High Holborn, were conducting business. Defendant, named Charles Day, formed a partnership with another Martin and called the firm Day & Martin, blacking manufacturers, 90½ Holborn Hill, and so advertised themselves on wagons, show cards, etc., and were using labels very similar to those of plaintiff. The master of the rolls, in granting the injunction, said: "My decision does not depend on any peculiar or exclusive right which the plaintiffs have to use the names of Day and Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, in fair and honest dealing, entitled. . . . He has the right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage."

1. In *Hookham v. Pottage*, L. R., 8 Ch. App. 91, plaintiff and defendant had been trading for some time as "Hookham & Pottage;" the partnership was dissolved by a decree of the court, and the continuation of the business awarded to Hookham, who substituted the sign "Hookham & Co." for "Hookham & Pottage." Defendant established a store only a few doors away, and displayed as a sign his own name, with the words "from Hookham & Pottage," in equally conspicuous lettering. The plaintiff prayed for an injunction, which was granted.

In *Glenny v. Smith*, 11 Jur. N. S. 964; 2 Dr. & Sm. 476; 13 L. T. N. S. 11; 13 W. R. 1032; 6 N. R. 363, defendant, a former employé of the plaintiffs, established a business of his own, putting on his business sign, his own name, far to the top, and in the most conspicuous position "Thresher & Glenny" in large letters, preceded by the word "from" in small letters. Injunction was granted.

In *Churton v. Douglas, Johns*, 174, defendant, with plaintiffs, traded as "John Douglas & Co.," sold good-will to plaintiffs, who continued under the name of "Churton, Bankhart and Hirst (late John Douglas & Co.)." Defendant subsequently opened a store next door as "John Douglas & Co." An injunction was granted to plaintiff, on the ground that the circumstances indicated an intention on the part of the defendant to mislead the public into believing that defendant was carrying on the business of the old firm which was the property of the plaintiff. See *supra*, this title, *Persons of the Same Name*.

2. In *Turton v. Turton*, 42 Ch. Div. 128, plaintiffs were trading under the old established name of "Thomas Turton & Sons." Defendant had been trading as "John Turton & Co.," but on taking his sons into the business, changed the firm name to John Turton & Sons. It was held that "there being no evidence of intention to deceive, although mistakes might occur, the defendants could not be restrained from the fair and honest use of their own names."

3. In *Mossop v. Mason*, 18 Grant's Ch. (Up. Can.) 453, plaintiff purchased from defendant, the business and good-will of the "Western Hotel." Defendant, after sale, opened a hotel in the same town under that name. It was held that the name passed with the sale of the good-will, and defendant must be enjoined from the use of that name in the same city.

In *Howard v. Henriques*, 3 Sandf.

peculiarity or purpose or use of a particular building—it becomes an inseparable part of the building, and will pass with a sale or lease of it, and cannot be severed from the building even by its first adopter and user.¹

(N. Y.) 725, plaintiff was the proprietor of the "Irving House" or "Irving Hotel." Defendant, in the same city, started a hotel, calling it the "Irving Hotel." The court, by Campbell, J., said: "We think that the principle of the rule is the same, to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated and by his skill rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business." An injunction was granted.

In *Robertson v. Buddington*, 28 Beav. 529, Romilly, M. R., said: "The good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated."

1. *Fullwood v. Fullwood*, 9 Ch. Div. 176. In *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1, defendant, who with plaintiff had been carrying on the drug business under the firm name of "Caswell, Hazard & Co., Established 1780," sold out the good-will of the business to plaintiffs, and then established another store, using the words "Established 1780." An injunction was granted restraining defendant from using these words. The court, by Westbrook, J., said: "Used, as these words and figures were, to identify a drug house, and to give it character by its age, and such use, continued for many years, necessarily distinguishing it from any other, it is quite apparent, that the exclusive enjoyment of such use is as valuable, as a species of trade-mark, to the continuers of that business, as the exclusive enjoyment of a trade-mark upon a well-known article is valuable to the manufacturer thereof. . . . No man may injure another's business and impose upon the public alike, by selling his own goods so disguised by the use of either the other's name or mark as to induce the buyer to believe they are those of the person whose name or mark they bear. The argument is as sound when applied to

an entire business as it is when applied to a single article."

Edwin Booth built in New York a theater which he named "Booth's Theater." He subsequently leased it to his brother, by whom it was assigned to the defendant, who continued to run it under the name of "Booth's Theater." Booth sought to restrain defendants from using this name, claiming that the public would be misled into believing that he was acting there. An injunction was refused. This was an unwarrantable supposition, the name merely designating the building. *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169.

In *Hudson v. Osborne*, 39 L. J. Ch. 79, defendant, proprietor of the "Osborne House" in Ludgate Hill, London, became insolvent and his business was sold to the plaintiff. Defendant subsequently opened a new place but a few doors distant from his former one, calling it "Osborne House." An injunction was granted.

In *Redlon v. Barker*, 4 Kan. 445; 96 Am. Dec. 180, it was held that, on the sale of a hotel, there being no clause of reservation in the deed, the sign post "Barker's Hotel," passed to the vendee.

In *Howe v. Searing*, 19 How. Pr. (N. Y. Super. Ct.) 14, it was held that a trade name will not pass with the sale of the good-will of a business.

In *Elliott's Appeal*, 60 Pa. St. 161, the court, by Read, J., said: "The cases cited by the auditor and on the part of the appellees differ from the present case in a very important particular, that Mrs. Elliott is the actual owner of the house and tavern stand, and derives no interest from the decedent in either. The good-will of an inn or tavern is local, and does not exist independent of the house in which it is kept."

In *Musselman's Appeal*, 62 Pa. St. 83, Thompson, C. J., said: "Nor can I comprehend how it (the good-will) existed independently of the property."

"The good-will of the business is nothing more than the advantage attached to the possession of the house, and the mortgagee, being entitled to the possession of the house, is entitled to the whole of the advantage." *Chisum v. Dewes*, 5 Russ. 30.

"It is difficult to see how the good-

9. **Suggestive Names.**—Names which to some extent suggest the character, quality, or ingredients of an article, or some supposed advantage to be derived from using it, or some effect to be produced by its use, have been ordinarily upheld as valid trade-marks.¹

10. **Collocation of Words.**—A peculiar collocation of words which, although descriptive in their meaning, are arbitrary in their selection and arrangement, and are not the only words which could be employed to describe the article to which they are applied, may be protected as a trade-mark.² Each case of this class will depend upon its own facts, for the reason that it will only be some peculiarity of selection, arrangement, or sound which will

will, consisting in the habit of the trade being carried on in the same place, can be distinguished, and separated from the lease of the house." *Crawshay v. Collins*, 15 Ves. 224.

In *King v. Midland R. Co.*, 17 W. R. 113, Giffard, V. C., held "that the good-will was incident to the mortgaged premises and passed with them."

In *Llewellyn v. Rutherford*, L. R., 10 C. P. 456, Lord Coleridge, C. J., held that the good-will of a public house inured to the benefit of the owner of the land, upon a tenant leaving it, who had built up a trade.

1. As for example, "Pain Killer," as applied to a medicinal compound, *Davis v. Kendall*, 2 R. I. 566; *Dr. J. M. Lindsay's Improved Blood Leecher*, "Blood Leecher," "Annihilator," *Fulton v. Sellers*, 4 Brew. (Pa.) 42; "Barker's Stomach Bitters," *Funk v. Dreyfus*, 34 La. Ann. 80; "Warren Hose Supporter," *Frost v. Rindskopf*, 42 Fed. Rep. 408; "Lightning Hay Knives," *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34; "La Favorita," *Menendez v. Holt*, 128 U. S. 514; "Cough Cherries," *Stoughton v. Woodard*, 39 Fed. Rep. 902; "Invigorator Spring Bed," *Ex p. Hayman*, 18 Pat. Off. Gaz. 922; "Anti Washboard Soap," *O'Rourke v. Central City Soap Co.*, 1043 P. & S.

2. The phrase, "Syrup of Figs," designating a liquid medicine, constitutes a valid trade-mark. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. Rep. 175. Here Beatty, D. J., said: "The appellants contend that the phrase 'Syrup of Figs' is merely descriptive of the preparation, and therefore cannot be adopted as a trade-mark. . . . The law, as stated in *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322 . . . is that 'words in common use, with some exceptions, may be

adopted, if at the time of their adoption they were not employed to designate the same or like articles of production.' . . . But, though it is not necessary that the word adopted as a trade-mark should be a new creation, never before known or used, there are some limits to the right of selection. . . . And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it entitled to legal protection. The phrase 'Syrup of Figs,' is in no sense a generic one. It is not a name of a natural product, or of a class of natural products. If such an article exists, it must be the result of a manufacturing process. So far as we are advised, the name never existed, nor was it applied to any natural or artificial product, until formulated by appellee of words of no prior association, and by it used to designate its preparation. Even if such medicine were made entirely of figs, it is still a new name, applied to a manufactured, and not a natural product; hence indicates rather its origin, than its quality, or even its nature."

In *Frost v. Rindskopf*, 42 Fed. Rep. 408, plaintiffs, whose trade-mark consisted of the words "Warren Hose Supporter," with a cut of the garter attached to a stocking, sued to restrain defendants from the use of "Warranted Hose Supporter," with a similar cut.

An injunction was granted. Wheeler, J., said: "Perhaps, as argued for the defendants, the words 'Warren Hose Supporter,' alone would not constitute a valid trade-mark; but in connection with the cut, they appear to be more than merely descriptive, and sufficiently arbitrary to denote fairly the origin of the goods when used for that purpose."

In *Ransom v. Ball* (Supreme Ct.), 7 N. Y. Supp. 238, protection was granted to "Miller's Universal Magnetic Balm," a medicine; Dwight, J., saying: "It is not pretended that the liquid possessed any of the properties of magnetism in the scientific sense of the word; nor do we think it clear that the use of the word 'Magnetic' in its title was intended to deceive the public in that respect. The word, so far as any meaning was attached to it, was probably used rather in a figurative, than in a literal or scientific sense; and there was but little danger of its being misunderstood."

In *Stoughton v. Woodard*, 39 Fed. Rep. 902, "Cough Cherries," applied to confections, was upheld as a valid trade-mark. Bunn, J., saying: "The words 'Cough Cherries' are not properly merely descriptive of the qualities of the thing manufactured and sold, but are to a large extent arbitrary and fanciful. . . . If the label adopted had been 'Cough Candy,' 'Cough Remedy,' or 'Cough Confection,' or if the article sold had been cherries in fact, and labeled as these goods were, the case would come within the ordinary rule. . . . But the words 'Cough Cherries,' applied to a confection, are clearly distinguishable, in my judgment."

In *Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492, plaintiffs, whose trade-mark was "Pratt's Astral Oil," sued to restrain defendants from using the words "Standard White Astral Oil." An injunction was refused. Acheson, J., said: "In the first place, I strongly incline to the opinion that the word 'Astral' was without the range of lawful appropriation as a trade-mark for refined petroleum, by reason of the fact that long before it was employed by Charles Pratt, the appellation had been given to an oil-burning lamp well known and in common use. . . . Then, in the second place, the appropriation of the word 'Astral' in one combination of words, does not preclude its use in all other combinations. See 13 W. N. C. (Pa.) 303; *Desmond's Appeal*, 103 Pa. St. 126; 119 P. & S. . . . The

plaintiff's trade-mark consists, not of the word 'Astral' alone, nor yet of the two words 'Astral Oil.' The prefix 'Pratt's' is the distinguishing word, in the plaintiff's combination, and in truth, is indispensable."

In *Pierce v. Guittard*, 68 Cal. 68; 58 Am. Rep. 1. "German Sweet Chocolate" was held to be infringed by "Sweet German Chocolate." The court declined to pass on the question of the validity of the words as a technical trade-mark.

In *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169, "Sliced Animals," the name of a toy puzzle, consisting of pictures of animals, etc., was upheld as a valid trade-mark.

In *Desmond's Appeal*, 103 Pa. St. 126; 49 Am. Rep. 118, plaintiff, manufacturer of "Samaritan's Gift" and "Samaritan's Root and Herb Juices," patent medicines, sued to restrain defendant from selling "Samaritan's Nervine." An injunction was refused. The court said: "An examination of the two shows they are quite dissimilar in name and appearance. It is true, each has the word 'Samaritan,' but in such different form and combination of words as to preclude one medicine being taken for the other. . . . The appropriation of the word 'Samaritan' in one combination of words does not prevent its being used in all other combinations."

In *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369, "Electro-Silicon," a polishing powder, was held to be a valid trade-mark. Brady, J., said: "But, as we have seen, it conclusively appears that neither the words in combination or singly employed, describe the article which they are intended to designate. It is a substance for polishing composed of infusorial earth, the proper description of which is not silicon, which exists in small quantities and is not an article of commerce. The words, therefore, are arbitrary and coined for the purpose of distinguishing an article which the plaintiff's predecessor first introduced into the commerce of the nation, of which it has become a part."

"Mere numbers are never the objects of a trade-mark, where they are employed to indicate quality, but they may be where they stand for origin or proprietorship, in combination with words and other numerals." *Humphrey's Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., said: "Words or devices, or even a name in certain

cases, may be adopted as a trade-mark, which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale." See also similar observations by Clifford, J., in *McLeon v. Fleming*, 96 U. S. 254.

In *Ex p. Glines*, 8 Pat. Off. Gaz. 435, the words "Slate Roof Paint," as a trade-mark for a paint for roofs, not containing over two per cent. of slate, were considered not descriptive, and admitted to registration; Spear, Act. Com., saying: "Upon careful consideration, I am inclined to think that they are not in any sense such terms as would naturally be employed in the ordinary use of the language to describe any composition of this general description, and that therefore the words are arbitrarily chosen and sufficiently out of the ordinary signification to constitute a peculiar mark. It is no objection to a mark sought to be registered as a trade-mark that it is appropriate to the article to which it is to be applied, or suggestive of good qualities, or peculiarly fit in any such way."

In *Davis v. Kennedy*, 13 Grant's Ch. (U. C.) 523, an injunction was granted to restrain defendant from the use of the words, "The Great Home Remedy, Kennedy's Painkiller," an infringement of the plaintiff's trade-mark, "Perry Davis' Vegetable Painkiller." Spragge, V. C., said: "The defendant's counsel contend that what the plaintiffs call a trade-mark is not properly a trade-mark, but a term of description of the article which they prepare. I do not agree in this. I take the word to fall within the class of trade-marks usually called fancy names or 'trade-marks;' which are arbitrarily selected by an inventor or manufacturer to catch the eye or ear of the public and to distinguish his article from others of the like nature. It is true that the term 'painkiller' is suggestive of the use of the medicine, but it is not an adjective nor is it used adjectively. It is a quaint combination of words, never probably used together before, forming a name by which the inventor desired that his preparation should be known, and calculated, as he rightly judged, from its quaintness to fix itself in the memory of the general public."

But see *Davis v. Harbord*, 60 L. J.

Ch. 16; 15 App. Cas. 316; 63 L. T. N. S. 389, where Lord Herschell, in declining to decide whether the words "Painkiller" were distinctive or not, said: "The two words no doubt are common English words, and when used in combination do convey a specific idea; but inasmuch as that combination of words has never, so far as one knows, been applied to anything except this preparation made and sold by the appellant, they have come to be used as descriptive of that preparation, so that the use of those words, and those words alone, would suggest the idea of that preparation and nothing else." See also *Davis v. Kendall*, 2 R. L. 566.

In *Williams v. Johnson*, 2 Bosw. (N. Y.) 1, plaintiffs, the *New England* manufacturers of "Genuine Yankee Soap," sued to restrain defendant in *New York* from the sale of soap of the same name. An injunction was granted, irrespective of the validity of the words as a technical trade-mark. Woodruff, J., said: "Whether, upon the taking of the proofs in the cause, it will appear that the particular words 'Genuine Yankee Soap' are to be deemed descriptive of the kind of soap which anyone may make and sell by its proper name, or are terms properly designating the plaintiff's manufacture, and so to be descriptive of their peculiar skill in making an article already in known and common use, by its proper and only generic name, soap, is perhaps not free from doubt." See *Williams v. Spence*, 25 How. Pr. (N. Y. Super. Ct.), 366, where the validity of the phrase as a trade-mark is established.

The following combinations of words have been protected as trade-marks:

"Cream Baking Powder." *Price Baking Powder Co. v. Fyfe*, 45 Fed. Rep. 799.

"Priestley's Silk Warp Henrietta." *Priestley v. Adams*, 59 Hun (N. Y.) 380.

"Piries Parchment Bank," a particular kind of paper. *In re Goodall's Trade-Mark*, 42 Ch. Div. 566; 38 W. R. 189.

In *Re Dunn's Trade-Mark*, 41 Ch. Div. 439; 63 L. T. N. S. 6; 39 W. R. 161; 15 App. Cas. 252, "Dunn's Fruit Salt Baking Powder" was held to be no infringement of "Cuo's Fruit Salt," an effervescing drink. Both were allowed registration.

"Hostetter's Celebrated Stomach Bitters." *Myers v. Theller*, 38 Fed. Rep. 607.

cause the courts to depart from the usual rule which denies protection to descriptive words;¹ but if any one or more of the

"The Baeder Flint Paper Company, New York." *Baeder v. Baeder*, 5 N. Y. Supp. 123; 52 Hun (N. Y.) 170.

"Akron Dental Rubber." *Keller v. B. F. Goodrich Co.*, 117 Ind. 556.

"Prince's Metallic Paint." *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun (N. Y.) 443.

"La Favorita," a brand of flour. *Menendez v. Holt*, 128 U. S. 514.

"Black Diamond," name of a scythe stone. *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896.

"Johnson's Anodyne Liniment." *Jennings v. Johnson*, 37 Fed. Rep. 364.

"Moxie Nerve Food." *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 148. See *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205.

"Maryland Club Whisky." *Cahn v. Gottschalk (C. Pl.)*, 2 N. Y. Supp. 13.

"Union Made Cigars." *Allen v. McCarthy*, 37 Minn. 349.

"A. N. Hoxie's Mineral Soap," "A. N. Hoxie's Pumice Soap." *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149.

"S. N. Pike's Magnolia Whisky, Cincinnati, Ohio." *Kidd v. Johnson*, 100 U. S. 617.

"Charter Oak," trade-mark for a stove. *Filley v. Child*, 16 Blatchf. (U. S.) 376.

"Pond Lily Wash," name of a washing-fluid. *Wright v. Simpson*, 15 Pat. Off. Gaz. 968.

"Roberts' Parabola Needles." *Roberts v. Sheldon*, 18 Pat. Off. Gaz. 1277; 8 Biss. (U. S.) 398.

"Dr. C. McLane's Celebrated Liver Pills." *McLean v. Fleming*, 96 U. S. 245.

"Vanity Fair," for cigarettes. *In re Kimball*, 11 Pat. Off. Gaz. 1109.

"Lacto-peptine," a medicine, infringed by "lacto-pepsine." *Carnick v. Morison*, L. J. Notes Cases (1877), p. 71.

"Bethesda Mineral Water." *Dunbar v. Glenn*, 42 Wis. 118; 24 Am. Rep. 395.

"Apollinaris Water." *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

"Licensed Victuallers' Relish," name of a sauce. *Cotton v. Gillard*, 44 L. J. Ch. 90.

"The Rising Sun Stove Polish," not infringed by "The Rising Moon Stove Polish;" both valid. *Morse v. Wor-*

rell, 9 Am. Law Rev. 368; *Codd. Dig.* 242.

"Grenade Syrup," made from the juice of the pomegranate. *Rillet v. Carlier*, 61 Barb. (N. Y.) 435.

"Sweet Opoponax of Mexico," name of a perfume. *Smith v. Woodruff*, 48 Barb. (N. Y.) 438.

"Stephens' Blue Black Writing Fluid." *Stephens v. Peel*, 16 L. T. N. S. 145.

"Pharaoh's Serpents," name of fireworks. *Barnett v. Leuchars*, 13 L. T. N. S. 495.

"Bell's Life in London and Sporting Chronicle," name of a paper. *Clement v. Maddick*, 5 Jur. N. S. 592; 33 L. T. 117; 1 Giff. 98.

"Taylor's Persian Thread." *Taylor v. Taylor*, 23 L. J. Ch. 255; 2 Eq. Rep. 290; 22 L. T. 271.

"The graduated, grooveless, drilled-eyed, ground down," applied to a new style of needle. *Shrimpton v. Laight*, 18 Beav. 164.

1. In *Fischer v. Blank*, 138 N. Y. 245, *Maynard, J.*, said: "So with respect to the term 'Black Package Tea,' we do not think it is such a distinctive appellation as will entitle the plaintiffs to its exclusive use in their business. It manifestly has reference either to the quality of the article, or to the color of the package in which it is sold. In either case it cannot be made the subject of individual appropriation."

"Trade-Mark Best Soap." *Babbitt v. Brown (Supreme Ct.)*, 23 N. Y. Supp. 25.

In *Keasbey v. Brooklyn Chemical Works (Supreme Ct.)*, 21 N. Y. Supp. 606, *affirming* 16 N. Y. Supp. 318, plaintiffs, manufacturers of "Bromo-Caffeine," sued to restrain defendants from using the same name; *Van Brunt, P. J.*, saying: "It is conceded that . . . the coupling together in combination of words which before that had been used apart, and had entered into the common or scientific vocabulary, does not give a right to the exclusive use of such combination, where it is indicative, not of origin, maker, use, and ownership alone, but also of quality and other characteristics. The questions, therefore, which are presented for solution by the facts found in this case, are: Does the trade-mark in question inform the reader or hearer of

the general characteristics and composition of the thing to which it is attached? Does it also inform of its quality and other characteristics, or is it indicative only of origin, maker, use, and ownership?" The court decided the former question affirmatively, thus holding the words no trade-mark.

In *Gessler v. Grieb*, 80 Wis. 21, "Gessler's Magic Headache Wafers" were held not to be infringed by "Brown's Alpha Headache Wafers." Cassoday, J., said: "We must hold that the words 'Headache Wafers,' as used by the plaintiff, whether together or separately, are each in common use, descriptive of common objects and qualities, and hence he has no exclusive right to the same as a trade-mark."

In *Trask Fish Co. v. Wooster*, 28 Mo. App. 408, plaintiffs sought to have protected, as a valid technical trade-mark, the words "Selected Shore Mack-erel." Lewis, P. J., said: "But this claim cannot be sustained consistently with fundamental rules in the law of trade-marks. A man cannot adopt any set of words that may happen to suit his fancy, without any reference to their purport or meaning, and then, by simply branding or otherwise placing them on every package of a commodity sold by him, acquire an exclusive right to their use as a trade-mark. No such right can be acquired in words which, by common understanding, are merely descriptive of the article, or of its kind, qualities, or characteristics, as these are generally known or talked about. Thus, if a grocer should brand or label the words, 'Best Brown Sugar,' on every parcel of that article sold by him, would it ever be supposed that all other grocers should be thereby precluded from using the same words in connection with their sales of the same article?"

In *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453, "Brown's Iron Bitters" was held to be not infringed by "Brown's Iron Tonic." Thayer, J., said: "Complainant's counsel does not, in express terms, assert that the words 'Brown's Iron Bitters,' either singly or collectively, constitute a trade-mark. Such a proposition, if asserted, could not be maintained, as it goes without saying that the words 'Iron Bitters' are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark."

Mere length in a collocation of words,

not peculiarly arranged, and purely descriptive, does not constitute a valid trade-mark. Thus, in *Gilman v. Hunnewell*, 122 Mass. 139, "The Universal Cough Remedy" was held not infringed by "Hunnewell's Celebrated Cough Remedy." Gray, C. J., said: "The plaintiffs cannot have a trade-mark in the descriptive words 'Cough Remedy,' or in the more extended description, 'A sure remedy for chronic or common cough, sore throat and other minor throat complaints so often by neglect the forerunner of consumption.'"

In *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115, "Eureka Ammoniated Bone Superphosphate of Lime," was held to be a valid trade-mark. Giles, J., said: "The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. . . . But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark. Such was the Greek word 'Eureka' applied to a fertilizer. . . . But the words 'Ammoniated Bone Superphosphate of Lime,' being the proper name of an article which anybody may make or sell, by themselves could never constitute a trade-mark. 'Eureka' was, therefore, for the purpose, and in the connection in which it was used, the complainant's trade-mark."

In *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233, "Ferro-Phosphorated Elixir of Calisaya Bark" was held not to be a valid trade-mark, being merely descriptive of the ingredients of a medicine.

In *Gray v. Koch*, 2 Mich. N. P. 119, the name "The Mammoth Wardrobe," applied to an establishment for the sale of ready-made clothes, was held not capable of exclusive appropriation, on the ground of descriptiveness.

In *Town v. Stetson*, 3 Daly (N. Y.) 53, protection was refused to the term "Desiccated Codfish," as applied to salt fish.

In *Braham v. Bustard*, 1 H. & M. 447; 11 W. R. 1061; 9 L. T. N. S. 199, "The Excelsior White Soft Soap" was protected as a valid trade-mark. Wood, V. C., said: "If, in this case, the plaintiffs had sought protection for the name 'White Soft Soap' only, the same principle would have been applied (*i. e.*,

words used be arbitrary, such as the name of a newspaper, it will support the use of other words which are either geographical or descriptive.¹

protection would have been refused). . . . But here the plaintiffs put the word 'Excelsior' before the 'White Soft Soap,' and it was not an unimportant circumstance that the plaintiffs did not simply call their article 'Excelsior White Soft Soap,' but 'The Excelsior White Soft Soap.'

In *Fetridge v. Wells*, 13 How. Pr. (N. Y. Super. Ct.) 385, the court refused to grant protection to the phrase "Balm of Thousand Flowers" as a trade-mark for liquid soap, because, first, it was a misrepresentation, or second, descriptive. Duer, J., said: "In short, an exclusive right to use, on a label or other trade-mark, the appropriate name of a manufactured article, exists only in those who have an exclusive property in the article itself, and it is not pretended that the plaintiff or his firm have any exclusive property in the preparation or compound to which the well-sounding name of 'Balm of Thousand Flowers' has been given. . . . This, however, is a species of property that, in my opinion, is unknown to the law, and that can only be given to one by an infringement of the rights of all." But see *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156.

The following collocations of words have been refused protection as trade-marks:

"John Bull Brand," applied to beer. *In re Paine's Trade-Mark*, 61 L. J. Ch. 365; 66 L. T. 642.

"Horsford's Acid Phosphate." *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524.

"International Banking Co." *Koehler v. Sanders*, 48 Hun (N. Y.) 48.

"Red, White and Blue" on a coffee label. *In re Hanson's Trade-Mark*, 37 Ch. Div. 112.

"Melrose Favorite Hair Restorer;" "Electric Velveteen." *In re Van Duzer's Trade-Mark*; *In re Leaf, Sons & Co.'s Trade-Mark*, 34 Ch. Div. 623.

"Hudson's Carbolic Acid Soap Powder," though admitted to registration in connection with other parts of a label. *In re Hudson's Trade-Marks*, 32 Ch. Div. 311.

"Price's Patent Candle Company, National Sperm." *In re Price's Patent Candle Co.*, 27 Ch. Div. 681.

"Braided Fixed Stars" applied to a particular kind of matches. *Bagallay, L. J.*, said: "I understand 'fixed stars' to mean cigar lights and the word 'braided' to indicate their having been prepared in a particular way." *In re Palmer's Trade-Mark*, 24 Ch. Div. 504.

"Highly Concentrated Compound Fluid Extract of Buchu." *Westbrook, J.*, said: "Neither is it pretended that the mixture is not, in fact, what its name declares, 'A Fluid Extract of Buchu,' the right to make which and to declare by plain words in common and general use the character of the mixture, must, in the absence of a patent, protecting the process of manufacture, belong to anyone able to make the article, and who desires to utilize his knowledge by its preparation and sale." *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 453.

"Improved Patent Gold Medal Self-Cleaning Rapid Water Filters." The patent having expired, the above words were only descriptive thereof, and open to public use. *Cheavin v. Walker*, 5 Ch. Div. 850.

"C's Patent Filters." *Cheavin v. Walker*, 46 L. J. Ch. 686.

"Nourishing London Stout." *Baggett v. Findlater, L. R.*, 17 Eq. 29.

"Aromatic Schiedam Schnapps" applied to gin; "Schnapps" meaning "dram," "drink;" "Schiedam" the place of manufacture, and thus denoting quality; and "Aromatic" also denoting a particular quality. *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204.

"Club House Gin," having come to indicate the quality. *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Upton* 187.

1. In *Stokes v. Allen*, 56 Hun (N. Y.) 526, "Spice of Life" was held to be no infringement of "Good Things of Life," the latter referring to extracts from "Life;" *Daniels, J.*, saying: "It may properly be conceded that words of common use may be so employed as to acquire a limited additional significance by way of designating a particular article of manufacture or production, and in that sense be entitled to the protection of the court by way of injunction against infringement by another person or persons."

Although there can be no exclusive right in the commercial name of an

11. **Statements True by Claimant and Untrue by All Others.**—Ordinary words or statements which, although descriptive, are indicative of some fact, which is true with reference to the person, firm, or corporation using them, may be protected as trade-marks, provided the words or statements are untrue when used or made by others, and by use have come to represent a valuable part of the reputation and good-will of a particular man, firm, company, or place of business.¹

article, as "Borax Soap," yet, when it is coupled with other distinctive features, the whole may be so appropriated. *Dreydoppel v. Young*, 14 Phila. (Pa.) 226.

1. In 1827, a drug business was established by one Wm. L. Rushton in New York City, which, by a succession of changes in the firm, was finally conducted by Wm. Hegeman and his son, J. N. Hegeman, under the name of Hegeman & Co. Their special preparations were distinguished by various names, and the labels attached bore a complicated device and the words "Established 1827." After the death of Wm. Hegeman, an assignment for the benefit of creditors was made, and the assignee thereunder sold to a purchaser the trade-marks, good-will, and trade name of the business, etc. After this sale, the surviving partner, J. N. Hegeman, with another, opened a business under the name of Hegeman & Co., sold the special preparations of the old firm, and used labels in all respects like that used by the old firm, except that the designation of the place of business was different. Daly, J., said: "There is a certain value in the business name, and they, and they alone, are entitled to the advantages of it, whatever those advantages may be. As they are carrying on the same business in the same place, the business name and the locality, as I have said, enter into, and are parts of, what in such a case constitute the good-will. *Howard v. Henriques*, 3 Sandf. (N. Y.) 725. 'This,' Lord Eldon said: 'is the probability that the old customers will resort to the old place' (*Crutwell v. Lye*, 17 Ves. 346); and '*the name of a firm*,' in the language of Vice Chancellor Wood in *Churton v. Douglass*, 1 Johns. 176, 'is a very important part of the good-will of the business carried on by the firm.'" *Hegeman v. Hegeman*, 8 Daly (N.Y.) 1. See *Washburn Mfg. Co. v. Haish*, 4 Fed. Rep. 900.

The words "Established 1780," or

"Established A. D. 1780," used conspicuously for a long period on the signs, bill heads, and labels of a firm, are a valid trade-mark. Westbrook, J., said: "When the copartnership between the plaintiffs and the defendant Caswell ended, in 1876, it is evident that the right to use the words 'Established 1780,' or 'Established A. D. 1780,' belonged to the business, and passed to the successors of the firm. Used, as these words and figures were, to identify a drug house, and to give it character by its age, and such use, continued for many years, necessarily distinguishing it from any other, it is quite apparent, that the exclusive enjoyment of such use is as valuable, as a species of trade-mark, to the continuers of that business, as the exclusive enjoyment of a trade-mark upon a well-known article is valuable to the manufacturer thereof. . . . The defendants in their new places of business, are not entitled to use a mark or sign which conveys an untruth, because it injures the plaintiff and the public alike." *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1.

In *Fullwood v. Fullwood*, 9 Ch. Div. 176; 47 L. J. Ch. 459; 38 L. T. N. S. 380; 26 W. R. 435, plaintiff was carrying on the business of an annatto manufacturer, established by his father in 1785, under the name of "R. J. Fullwood & Co.;" defendants, one of whom had formerly been a partner of plaintiff, but had sold to plaintiff his interest in the business, described their firm as "E. Fullwood & Co. (late of Somerset Place, Hoxton), Original Manufacturers of Liquid and Cake Annatto," and used upon their wrappers, in the same way as plaintiffs, the words "Established in 1785." An injunction was granted to restrain defendants from representing their business to have been established in 1785, or as having been lately carried on at Somerset Place, Hoxton, or as being identical with or in any way connected with the business of plaintiffs.

IV. WHAT MAY NOT BE A VALID TRADE-MARK—1. Descriptive Words and Marks—*a*. QUALITY AND CHARACTER.—Words or names which simply indicate the quality of articles or of their ingredients, or their character, are, as a general rule, words which others may employ for the same purpose with equal truth, and hence cannot be exclusively appropriated by any one as a trade-mark. They are words of the English language or of other languages used in their ordinary sense, for the purpose for which all men have a right to use them, and to allow any such words to be appropriated by one trader, would result in great injustice and inconvenience to the public.¹

In 1847, three brothers, named Rogers, commenced the manufacture of plated spoons, stamping them with various devices, each containing the name "Rogers." In 1862, said brothers contracted with petitioners that the latter should manufacture such goods under their supervision. These goods were stamped "1847 Rogers Bros. A 1." Defendant acquired the right from other persons named Rogers, to use said name on such goods manufactured by himself, and adopted as his mark "C. Rogers Bros. A 1," and "C. Rogers & Bros. A 1." It was held that the "combination" of complainants constituted a trade-mark. An injunction was granted to restrain the use of all words in the stamp but "Rogers." *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 401. See also *Rogers v. Rogers*, 53 Conn. 121; 55 Am. Rep. 78.

In *James v. James*, L. R., 13 Eq. 421, Lord Romilly, M. R., said: "Lieutenant James discovered a valuable ointment for blistering horses. He assigns it to persons, who carry on the business and sell his blistering ointment, there being nobody else in the field, and they state, with perfect propriety, that the only genuine one is theirs. Another person gets the recipe in such a form that he is entitled to use it; and thereupon he says: 'I am the only genuine one.' I am of opinion that he is not entitled to say that; but is he thereupon entitled to file a bill, and call upon the others to alter their advertisements? I do not know that that has ever been determined; all I can say is, that that would be relief which I could not give in this suit."

The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original;" and if he or they have been in the habit of so doing, an injunction will be

granted to restrain another manufacturer from applying the designation to his goods. *Cocks v. Chandler*, 11 Eq. 446. The complainant in this case was the successor in business to the original inventor of "Reading Sauce," and had been in the habit of labeling this article, as his predecessor had done, with the words "The Original Reading Sauce." An injunction was granted to restrain the use by defendant of the word "Original."

In *Glen, etc., Mfg. Co. v. Hall*, 6 Lans. (N. Y.) 158; 19 Am. Rep. 278, the court said: "If the man who uses the street or number as a part of his trade-mark (*e. g.*, No. 10 South Water St.), has the exclusive use of the building indicated by the number, I do not doubt he may use it as a part of his trade-mark against persons who have no right to or interest in the building indicated by the number, but who use it as a part of their trade-mark, in order to pirate on the one justly entitled to use such number to designate his place of business."

In *Lazenly v. White, Cox's Man. Trade-Mark Cases* 344, plaintiffs were successors in business of the inventor of "Harvey's Sauce" (that name having become generic), and defendant began to sell a sauce under name of "The Original Lazenly's Harvey Sauce." An injunction was granted. See also *Lazenly v. White*, L. R., 6 Ch. 89; 19 W. R. 291.

1. The words "Svenska Snusmagisinet," meaning "Swedish snuff-stove," are descriptive of the business carried on, and cannot be monopolized. *Bolander v. Patterson*, 136 Ill. 215.

The word "Tycoon," applied to tea as a trade-mark, cannot be protected, it appearing in evidence that it has been for many years in common use as a term descriptive of a class of teas introduced into the American market

from *Japan*. *Corbin v. Gould*, 133 U. S. 308. See also *Stachelberg v. Ponce*, 128 U. S. 686.

The words "Selected Shore Mackerel," are purely descriptive, and invalid as a trade-mark. *Triask Fish Co. v. Wooster*, 28 Mo. App. 408.

The words "International Banking Company," are descriptive of the business carried on, and are not a valid trade name. *Kochler v. Sanders*, 48 Hun (N. Y.) 48.

"Liquid Glue," applied to the article so called, is descriptive, and not a valid trade-mark. *Russia Cement Co. v. LePage*, 147 Mass. 206.

The words "Taffy Tolu," applied to chewing gum, "indicate or describe the character of the labeled goods, rather than their origin," and are not a valid trade-mark. *Colgan v. Danheiser*, 35 Fed. Rep. 150.

Registration was refused the word "Crystalline," applied to artificial stones, etc., on the ground of descriptiveness. *Ex p. Kipling*, 24 Pat. Off. Gaz. 899.

The term "Straight Cut," applied to cigarettes, is descriptive of the ingredients and character of the article used, and is not a valid trade-mark. *Wallace, C. J.*, said: "No principles are better settled in the law of trade-marks than that a generic name, or a term merely descriptive of the ingredients, quality or characteristics of an article of trade, cannot be the subject of a trade-mark." *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782.

The term "Snowflake," as applied to bread or crackers, is descriptive and not a valid trade-mark. *Larrabee v. Lewis*, 67 Ga. 562; 44 Am. Rep. 735.

The words "time keeper" are not the proper subject for a trade-mark for watches, their only office being to indicate the nature of the goods to which they are applied. *Ex p. Strasburger*, 20 Pat. Off. Gaz. 155.

In *Electro-Silicon Co. v. Levy*, 59 How. Pr. (N. Y. Supreme Ct.) 469, the court said: "The plaintiff can have no exclusive right in the use of the word 'silicon,' which is reasonably, in so far as the substance of this powder is concerned, descriptive." But the combination "electro-silicon," as applied to a polishing powder, was held by the same court to be valid, in *Electro-Silicon Co. v. Trask*, 59 How. Pr. (N. Y. Supreme Ct.) 189, and the subsequent case of *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369.

The term "Crack-proof," applied to

rubber goods, is descriptive of quality and not registrable. *In re Goodyear Rubber Co.*, 11 Pat. Off. Gaz. 1062.

The symbol " $\frac{1}{2}$ " in red, on cigarettes, indicates, although it does not express, the idea of two kinds of tobacco being used in the cigarette—"half and half"—and is not protectible. *Kinney v. Allen*, 1 Hughes (U. S.) 106.

The word "Julienne," a name applied to an article composed of vegetables for soup, is not protectible when used with reference to a specific kind of that article, it being merely descriptive. *Godillot v. Hazard*, 49 How. Pr. (N. Y. Super. Ct.) 5.

Registration was refused "Parson's Purgative Pills, P. P. P.," and "Johnson's American Anodyne Liniment, Established A. D. 1810," on the ground of descriptiveness, although the letters themselves, if used alone, might have acquired an arbitrary signification and been registrable. *In re Johnson*, 2 Pat. Off. Gaz. 315.

In *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115, an agricultural compost had been called "Eureka Ammoniated Bone Superphosphate of Lime." Protection was asked (and granted) as to the word "Eureka," but was not asked for the rest of the phrase.

In *Choynski v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476, the phrase "The Antiquarian Book Store," was held to be merely descriptive of the class of books sold, and not entitled to protection.

The term "Desiccated Codfish," is descriptive of the article sold, and cannot be protected. The court said: "No manufacturer can acquire a special property in an ordinary term or expression, the use of which, as an entirety, is essential to the correct and truthful designation of a particular article or compound." *Town v. Stetson*, 5 Abb. Pr. N. S. (N. Y. C. Pl.) 218; 3 Daly (N. Y.) 53.

The words "Old London Dock Gin," are descriptive of the article, and not a valid trade-mark. *Binninger v. Wattles*, 28 How. Pr. (N. Y. C. Pl.) 206.

The name "Night-Blooming Cereus," applied to a perfume, cannot be protected; first, on the ground of misrepresentation (the perfume not being made from that flower); second, because, even if made from that flower, the words in question would be merely descriptive. The court said: "The trade-mark, to be capable of exclusive use, must be such as will identify the

b. PECULIAR EXCELLENCE.—Words, numbers, letters, or symbols which merely indicate the peculiar excellence of goods, cannot be exclusively appropriated.¹

article to which it is affixed as that of the person naming it, and distinguish it from others. A word which is the name of the article, or indicates its quality, cannot be so appropriated. Every one has the right to manufacture the same article, and to call it by its name or descriptive character.” *Phalon v. Wright*, 5 Phila. (Pa.) 464.

The words “Club House,” as a brand for gin, are invalid as a trade-mark. They express quality. *Corwin v. Daly*, 7 Bosw. (N. Y.) 222.

The words “Schiedam Schnapps,” applied to gin, are descriptive, and incapable of exclusive appropriation. The court said: “When a person forms a new word to designate an article made by him, which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article; but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles.” “Schiedam” is the name of a town in *Holland*, and “schnapps” is a word adopted from the German language, meaning a dram. *Wolfe v. Goulard*, 18 How. Pr. (N. Y. Supreme Ct.) 64. A different ruling was held in *Wolfe v. Barnett*, 24 La. Ann. 97; but the first was sustained in *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204, and *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125-134.

English Cases.—The word “Satinine,” applied to starch and blue, is descriptive of a glossy surface, and not registrable. *In re Meyerstein’s Trade-Mark*, 43 Ch. Div. 604. See *In re Leonard’s Trade-Mark*, 26 Ch. Div. 288.

In *Leonard v. Wells*, 53 L. J. Ch. 233; 32 W. R. 532; W. N. (1884), p. 60, the word “Valvoline” was refused protection, on the ground that it was a mere term of description meaning “valve oil,” and had been used by claimants for years. See also *In re Horsburgh*, 53 L. J. Ch. 237; *Cox’s Man. of Trade-Mark Cases* 597.

There is no exclusive right to the words “Civil Service,” used as part of a trade name. *Civil Service Supply Assoc. v. Dean*, 13 Ch. Div. 512.

Both the word “Porous” and the

phrase “Allcock’s Porous Plasters,” are descriptive and incapable of registration. *In re Brandreth’s Trade-Marks*, 9 Ch. Div. 618; 47 L. J. Ch. 816; 27 W. R. 281.

There is no exclusive right in the term “Station” as part of a hotel name, it being a mere descriptive title. *Carleson v. Campbell*, Ct. of Sess. Cas. 4th Ser. IV. 149; 14 Scot. L. R. 104.

In *Raggett v. Findlater*, L. R., 17 Eq. 59; 43 L. J. Ch. 64; 29 L. T. N. S. 448; 22 W. R. 53, the words “Nourishing Stout,” on labels attached to bottles containing that liquor, were refused protection, on the ground that a mere English adjective denoting quality could not be the subject of a trade-mark. The court said: “It is of great importance that, by the use of a particular word or anything which may be called a trade-mark, the right should not be unduly extended so as to infringe on the rights of traders to call their articles by a quality they possess, or to give an undue protection to any man who happens to use a particular word.”

The words “*Ne Plus Ultra*,” having become common to the trade, are not a valid trade-mark on packets containing needles. *Beard v. Turner*, 13 L. T. N. S. 746.

In *Colonial Life Ins. Co. v. Home, etc., Ins. Co.*, 33 Beav. 548; 33 L. J. Ch. 741; 10 Jur. N. S. 967; 10 L. T. N. S. 448; 12 W. R. 783; 4 N. R. 129, the word “Colonial” was refused protection as part of a trade name, it being merely descriptive of the kind of business carried on.

In *Burgess v. Burgess*, 3 D. & G.; M. & G. 896, it was held that the words “Essence of Anchovies,” applied to a fish sauce, correctly described the article, and could not be a valid trade-mark.

An exclusive right cannot be acquired in such words as “Pictorial” or “Illustrated.” *Spottiswoode v. Clarke*, 2 Ph. 154; 1 Coop. C. C. 254; 10 Jur. 1043; 8 L. T. 230-271.

The words “Medicated Mexican Balm,” applied to a hair tonic, are not a valid trade-mark, “because all the words that are used in the phrase are perfectly capable of being applied to a very different composition.” *Perry v. Truefitt*, 6 Bear. 66; 1 L. T. 384.

1. There can be no trade-mark in the

c. GRADE.—The marks, letters, numbers, or words, by which the grade or quality of a manufactured article is designated, cannot alone be protected as a trade-mark, notwithstanding the fact that the symbols indicating grade may by long use have come also to indicate ownership and origin. If the symbols do actually

words "Trade-Mark Best Soap." *Babbitt v. Brown* (Supreme Ct.), 23 N. Y. Supp. 25.

The words "La Favorita," as applied to particularly selected and classified flour, were sustained as a valid trade-mark; Fuller, C. J., saying: "The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence.

. . . The case clearly does not fall within the rule announced in *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51." *Mendendez v. Holt*, 128 U. S. 514.

In *Humphrey's Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250, the court said: "Mere numbers are never the objects of a trade-mark, where they are employed to indicate quality, but they may be where they may stand for origin or proprietorship, in combination with words and other numerals."

In *Miller Tobacco Manufactory v. Commerce*, 45 N. Y. L. 18; 46 Am. Rep. 750, the declaration states that plaintiff manufactures and puts up for sale a certain kind of tobacco, in wrappers on which are printed "Mrs. G. B. Miller & Co. Best Smoking Tobacco," with their address, etc., and that defendants fraudulently stamped similar packages with the words "Mrs. C. B. Miller & Co. Best Smoking Tobacco," etc. A demurrer to the declaration was overruled.

In *Lichtenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592, the phrase, "IXL General Merchandise Auction Store" was refused protection against "Great IXL Auction Co.," the signs not being sufficiently similar. The court said: "It is claimed that the letters 'IXL' could not be used by the respondent after being appropriated by the appellant. The letters have been used by many manufacturers to denote their wares, as on cutlery and on bitters, and were not the invention of the plaintiffs, but taken by them from former

proprietors and inventors thereof, and do not by themselves make a trade-mark, any more than the word 'excelsior' which is often used with other words to make a trade-mark or sign."

The words "Gold Medal," applied to *saleratus*, indicate excellence, and are not a valid trade-mark. *Taylor v. Gillies*, 59 N. Y. 331; 17 Am. Rep. 333.

In *Gillotti v. Esterbrook*, 47 Barb. (N. Y.) 455; 48 N. Y. 374; 8 Am. Rep. 553, the court said: "The mark last named ('303' on pens) except, perhaps, the words 'extra fine,' seem to be within the rule that allows a device to become a trade-mark. . . . A word that is well known in the language and which is the name of an article, or words that merely indicate the quality of an article, cannot, it seems, be so exclusively appropriated as a trade-mark. Nor can the appropriated name of a manufactured article, if the article is a known substance or production, be exclusively used as a trade-mark, except by those who have an exclusive property in the article itself, though a mere name may be protected as a trade-mark where it is used merely to indicate the true origin or ownership of the article offered for sale, or when a new preparation or compound is made, and a distinctive and specific name is necessarily given to it, which has not before by adoption and use become known."

In *Braham v. Bustard*, 1 H. & M. 447; 9 L. T. N. S. 199; 11 W. R. 1061, Wood, V. C., said: "He could not hold that the name (Excelsior) merely described a quality, so that, like 'superfine,' it had become common property."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, Duer, J., said: "As the plaintiffs could not have acquired, by their prior occupation, an exclusive right in the use of the words, 'first quality,' or 'superfine,' they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning." See *In re Barrows*, 5 Ch. Div. 353. See also *supra* this title, *Devices or Symbols: Numerals*.

indicate grade and were adopted for that purpose alone, protection will be refused.¹

1. This rule is based upon the leading case of *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 55, where it was held that the letters "A. C. A.," adopted by the Amoskeag Manufacturing Company for the purpose of indicating the first quality of their product, was not a valid trade-mark for the reason that it indicated grade, and was in the opinion of the court adopted for the purpose of indicating grade only. This decision was made, notwithstanding the fact that the letters "A. C." were the initials of the Amoskeag Company and stood for the name of the manufacturer, the letter "A" indicating the first quality of the goods. The evidence also showed that the letters "A. C. A." were the well-known and well-understood distinguishing brand of the Amoskeag Manufacturing Company, and that wherever the goods of the Amoskeag Company were sold under this brand, as they had been for thirty or forty years at the date of the suit, they were well-known to the trade by these letters. The case lays down the doctrine stated above, that if letters, symbols, or words are adopted by a manufacturer to indicate quality merely, that no amount of subsequent reputation which those letters, figures, or words may acquire, and which reputation has caused the letters or words to become clearly distinctive of ownership or origin, can save the trade-mark and bring it within the limits of what a court of equity will protect. Attention is especially directed to the dissenting opinion of Justice Clifford in this case; the English cases hereafter referred to, are considered with great care, and with a great desire to do equity, and have fallen into the same line suggested by Justice Clifford—that is to say, they hold that there is no good reason why a trade-mark, which is not objectionable as a trade-mark, but which was originally adopted to indicate quality only, and which, by subsequent acceptance and use, has come to indicate ownership and origin clearly, should not be protected and be given the benefit of all personal reputation which has by use come to be attached to the marks.

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. Rep. 776; 138 U. S.

537, it was held that the letters "L L," stamped on cotton sheeting, being adopted originally by complainant to indicate quality, and being previously known to the trade as indicative of quality, are not a valid trade-mark. Jackson, J., said: "Whether letters, by themselves, or in combination, can be employed to represent both the grade or quality of the goods and their origin, thus performing, at the same time, the double office of trade-mark and description, or classification of the article to which they are affixed, is a question not discussed in either of the supreme court decisions above referred to. This theory that the letters 'L L' signify or possess the dual meaning contended for, is unsupported in point of fact by the evidence. But, suppose it actually existed, it may well be doubted whether such double signification could stand under the law of trade-marks, so as to confer an exclusive right to the use of such a symbol. . . . Does the law allow to parties the privilege of thus blending public and private rights? . . . This would be a strange anomaly in the law and would lead to inextricable confusion. Where origin and ownership is otherwise indicated, as by the use of the manufacturer's name, then the symbol, mark, or device which is intended to designate grade, class, or quality, cannot properly be also employed to denote origin or manufacture, and thus confer exclusive right to its use." In the opinion in the above recited case, the fact that complainants had stamped goods of inferior grade, but of the same weight and class, with the same mark, was relied upon by the court as indicating an intention to deceive, and thereby precluding complainant from obtaining protection. In the *United States Supreme Court* Fuller, C. J., said: "Nothing is better settled than that an exclusive right to the use of words, letters, or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Strat-*

ton, 12 Fed. Rep. 696); yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trade-mark."

In *Royal Baking Powder Co. v. Sherrell*, 93 N. Y. 331; 45 Am. Rep. 229, *reversing* 59 How. Pr. (N. Y.) 17, plaintiff used the term "Royal" to designate the best grade of his flavoring extracts. Rapallo, J., said: "Letters or figures which, by the custom of trades or the declaration of the manufacturer, are only used to denote quality, are incapable of exclusive appropriation, but are open to use by anyone, like the adjectives of the language."

In *Avery v. Meikle*, 81 Ky. 73, complainants branded steel series of plows with word "Pony" and letters "A O," "B O" and "C O," and their cast series with numerals "1/2," "1," "2," "3" and "8," besides their trade-mark, a maltese cross, etc., and the words of caution, "Keep all taps screwed up." Defendants used almost identical letters, the same numerals, and the same words of caution. Hargis, C. J., said: "As to the numerals, '1/2,' etc., they were used by appellants to denote the size and quality of their cast series. This is the evidence, and although the letters and numerals on both sides may have come to indicate to the public the origin or ownership of appellants' plows, as they did not appropriate them by adoption, use, or claim, as a part of their trade-mark, they cannot be treated as a part of it simply because they appear capable of serving the same purpose."

Numerals arbitrarily selected, and used on goods in combination with other devices, to denote the origin of goods and not their quality, are a valid trade-mark, and a person who uses them in combination with other devices which he has a right to use, may be restrained by a bill in equity from so using them, if he does so for the purpose of imitating the trade-mark, and his use is calculated to deceive, and does deceive, persons buying his goods. The court said: "It appears that these figures (523) were selected arbitrarily; that they were of unusual and distinctive form; that they were added to the original device, consisting of the eagle, the wreath, and the plaintiff's name, at the time when the word 'trade-mark' was also added; and that the whole, so com-

posed, has been used as one trade-mark ever since." *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325; 37 Am. Rep. 362.

In *Re Eagle Pencil Co.*, 10 Pat. Off. Gaz. 981, application for the registration of a trade-mark for pencils, consisting of the combination of the whole number usually marked thereon, with a fraction, as 1 1/4 for 1, etc., was refused on the ground that this device was "simply a new arrangement for the purpose of indicating quality."

In *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 333, the court said: "There is no principle more firmly settled in the law of trade-marks, than that the words or phrases which have been in common use and which indicate the character, kind, quality and composition of the thing, may not be appropriated by any one to his exclusive use. In the exclusive use of them the law will not protect. Nor does it matter that the form of words or phrases adopted also indicate the origin and maker of the article. The combination of words must express only the latter." See *Hirst v. Denham*, L. R., 14 Eq. Cas. 542.

No exclusive right can be claimed in the letters and numerals "A No. 1," "A. X. No. 1," etc., used to designate different qualities of plows. *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125.

In *Stokes v. Landgraff*, 17 Barb. 608, the terms "Galen," "Lake," "Cylinder," "Wayne," and "New York," under which certain grades of glass were sold, were held to indicate quality merely, and not origin, and not to be capable of exclusive appropriation.

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, the letters "A. C. A.," on a label attached to cotton tickings, were held indicative of quality and could not be protected. The court, by Duer, J., said: "As the plaintiffs could not have acquired by their prior occupation, an exclusive right in the use of the words 'first quality,' or 'superfine,' they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning. It is immaterial whether words, or letters, or figures, or any other signs, are used, if the single fact that they are used to indicate or declare, is a truth that other manufacturers or dealers have an equal right to express and communicate.

d. WORDS INDICATING A PROCESS OF MANUFACTURE. — Words indicating a process of manufacture, cannot be protected as a trade-mark, apart from other words indicating ownership and origin, if the process is known and is public property. If the process is secret, but is known by a name, then the name necessarily indicates ownership and origin, and will be protected; or if the process be patented and the patent held as a monopoly by the owner or owners, then words indicating the patented process or goods made under it, will be protected, because any use of them by another would be a false statement, unless the user were an infringer, and in any case the use of such words by one not an owner or licensee under the patent, would be enjoined as a fraud upon the owner of the patent and the public, and an unlawful interference with the exclusive rights granted to the patentee by his patent.¹

. . . He (the owner of an original trade-mark) has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose."

In *Ransome v. Graham*, 47 L. T. N. S. 218, it was held that where a manufacturer places on his goods a series of combinations of letters as trade-marks, each of which serves to indicate to purchasers, first, that the goods are manufactured by the person using the mark; and second, the quality of the goods as compared with the goods respectively bearing the other marks in the series; the marks, being exclusively used by the manufacturer, are valid trade-marks, notwithstanding that they are indicative of the quality of the goods to which they are applied. Here plaintiff marked a series of plows R. N. (R. standing for Ransome, and N. for Newcastle); and in order to distinguish the patterns of the series, and the purposes for which the series might be used, he added further letters, as R. N. D., R. N. E., etc., and also numerals, which referred to sizes and shapes of the several parts of each plow. There had also been a patent under which complainant's plows (not this particular series only) were made, but it had long since expired, apparently long before the adoption of the said marks.

It is proper to register a series of marks which differ from each other only by combining in different modes a mark common to them all and peculiar to the trader, with words merely indicative of the quality of the goods marked, or

symbols common to the trade. *In re Barrows Trade-Mark*, 5 Ch. Div. 353. In this case, various words and devices, commonly used in the trade as indicative of various qualities or grades of iron, were combined with the initials of the firm and in such connections sustained. The court said: "Now, in this case, if anybody were to put on their iron 'Extra Treble Best' simply, there would be no trade-mark and no infringement of any right; but if anybody put on their iron 'B. B. H. Bloomfield, Extra Treble Best,' B. B. H. meaning Bradley, Barrows & Hall; Bloomfield meaning the works, the whole combination would mean the iron of which 'Extra Treble Best' is the description . . . and the combination becomes a trade-mark.

1. Whether a name has acquired a generic meaning indicative of kind, quality, or class of goods, and has therefore become *publici juris*, is a question of fact. *Williams Mfg. Co. v. Noera*, 158 Mass. 110. See *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324; 149 U. S. 562.

Where a patentee uses his name and marks to designate his invention, and also the product of it, as manufactured by himself, so that the public cannot separate the one from the other, he cannot acquire any right to the exclusive use of the name and marks after the patent has expired. So there is no exclusive right to the use of the word "Singer;" and the shuttle device of complainant is not infringed by that of defendants, the only similarity being that the labels in both cases are affixed to the arms, and the letter "S" to the

legs. *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706. The court said: "It is the consideration now due to the public, when the patents have expired, that it shall have the unobstructed benefit of these inventions, and there is not the least foundation in principle or reason for allowing the patentees to continue to enjoy as much of the monopoly as they can save by the claim to use exclusively the trade names and marks by which they identified and secured to themselves the reputation of their inventions."

The words "Indurated Fiber," as applied to wares made of wood pulp, "are not arbitrary or fanciful words, but are descriptive rather of the quality, ingredients, or characteristics of the manufactured article." *Indurated Fiber Co. v. Amoskeag Indurated Fiber Ware Co.*, 37 Fed. Rep. 695.

In *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, Field, J., said: "But the name of 'Goodyear Rubber Company' is not one capable of exclusive appropriation. 'Goodyear Rubber' are terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by anyone." See the earlier cases of *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.*, 30 Pat. Off. Gaz. 97; *P. & S.* 141; and *Goodyear Rubber Co. v. Day*, 22 Fed. Rep. 44.

The words "Gold Leaf," as applied to flour, being a brand in common use in the trade to designate quality and the process of manufacture, are not a valid trade-mark. *Partlo v. Todd*, 17 Can. Sup. Ct. 196.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, Bradley, J., said: "The complainant was incorporated under the laws of *New York* in 1871, and has ever since that time used its corporate name in carrying on its business of the manufacture and sale of various compounds of pyroxyline . . . that, in order to designate its said manufactured product, and to distinguish it from similar compounds manufactured by others, the complainant, from the first, adopted and used the word 'celluloid,' . . . and used the word as a trade-mark. . . . That in 1873 complainant caused said word 'celluloid' to be registered as a trade-mark . . . and again registered in 1883, under the subsequent act. . . .

Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied, from the evidence adduced before me, that the word 'celluloid' has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellation of the substance manufactured, can take away the complainant's right. It seems to me that it cannot. As a common appellation, the public has a right to use the word for all purposes of designating the article or product, except one; it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles; the complainant alone can do this, and any other person doing it will infringe the complainant's right. Perhaps the defendant would have a right to advertise that it manufactured celluloid; but this use of the word is very different from using it as a trade-mark stamped upon its goods. It is the latter use which the complainant claims to have an exclusive right in; and, if it has such right (which, it seems to me, it has), then such a use by the defendant of the word 'celluloid' itself, or of any colorable imitation of it, would be an invasion of the complainant's right. As a trade-mark, it indicates that the article bearing it is the product of the complainant's manufacture."

Where it is very doubtful whether the name claimed does not describe the articles themselves, and the kind of them, and indicate that they are made according to the patent, known by the name claimed, rather than that the patentee made them, a preliminary injunction should not be granted. The words claimed were "Pile Leclancha" and "Disque," Leclancha being the name of the patentee. *Leclancha Bat-*

tery Co. v. Western Electric Co., 21 Fed. Rep. 538.

See also *Leclanché Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276, where Wallace, J., said: "When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which it is recognizable."

In *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279, the word "Singer," applied to a sewing machine, was refused protection as a trade-mark after the expiration of the patent. The court said: "Inasmuch as the word 'Singer' indicates a machine of peculiar mechanism, and every one has a right to make such a machine, the word 'Singer' attached to such machine is common property." The above case was cited with approval and followed in *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706. See also the late case of *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208, where the court said: "It would be a dangerous doctrine to concede that a patentee, who has invented a machine which has gone into extensive public use, can, after the patents have become public property, still prevent the public from having the benefit of the invention, until they devise and adopt some new form of construction from that adopted by the manufacturers under the patents, and create a new reputation for their machine."

In *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679, Paine, Commissioner, said: "But now the applicants assert that by assignment they have become the owners, not only of certain patents with which this trade-mark has been associated, but also of the trade-mark itself, and that it has been used by their assignors seventeen years; that it was used as a common-law trade-mark nearly eight years before 1870. This was a valid trade-mark at common law, subject, of course, to the rights of other persons of the same name, whatever they might be. The fact that the owners of the trade-mark also owned certain patents with which it was connected, did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole, and not merely certain parts of it, have terminated the existence of the trade-mark which had been

used during the life of the patent. If the applicants are the legal assignees of the patents and of the trade-mark, they are protected by the statutory provision which preserves the right to register common-law trade-marks which were in use before 1870. If the applicants shall so amend their application as to show in their oath that they are the assignees of this trade-mark; that it has been used by their assignors for seventeen years, and that they are also the lawful assignees of the patents relating to parts of this fruit jar, under which the jar bearing the trade-mark in question has been sold, they will be entitled to registration."

In *re Consolidated Fruit Jar Co.*, 14 Pat. Off. Gaz. 209, Doolittle, Acting Commissioner, said: "Applicants adopt the name 'Mason' as the essential mark. . . . If there were an accompanying mark, that should be the one recorded and known as the particular trade-mark of applicants. It is a universal custom to refer to patented articles by the name of the inventor, as the Howe sewing machine, the Bell telephone, etc.; and such names soon become generic in their character, designating a particular kind or class of articles. So it is in the present case. During twelve years precedent to the year 1870, the particular form of fruit jar made by applicants had become widely known as 'Mason's Fruit Jar,' and it no doubt will continue to be so known as long as the demand for it exists. It is also clear that applicants were enabled to stamp on their goods the label 'Mason's Fruit Jar,' and to protect themselves in the exclusive manufacture and sale of the article by virtue of the patents owned by them. If ownership or right to manufacture under the patents had been vested in others, there can be no doubt that they, too, would have been entitled to use this stamp. When all such rights cease by the expiration of the patents, the public will succeed thereto, and no one can be prevented from manufacturing and selling Mason's fruit jars, and stamping them as such." See *Tucker Mfg. Co. v. Boyington*, 9 Pat. Off. Gaz. 455.

In *Singer Mfg. Co. v. Larsen*, 8 Biss. (U. S.) 151, it was held that the word "Singer," as applied to sewing machines, was descriptive of the principle of manufacture and invalid as a trade-mark, the various patents having expired. But in *Singer Mfg. Co. v. Brill*,

5 Month. L. Bull. (Ohio) 523, the word "Singer" was protected, apparently on the ground that evidence showed the machines of the plaintiff not to be manufactured on any one system.

In *Linoleum Mfg. Co. v. Nairn*, 7 Ch. Div. 834; 47 L. J. Ch. 430; 38 L. T. N. S. 448; 26 W. R. 463, the word "Linoleum," being the name given to a new substance by the inventor and patentee, it was held that he had no exclusive right to the word after the patent had expired. The court said: "The word directly and primarily means solidified oil. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are sole manufacturers. In my opinion, it would be extremely difficult for a person, who has been, by right of some monopoly, the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article."

In *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337, the words "Fairbanks' Patent" were cast in the scales made by both parties. All the patents which Fairbanks & Co. had, had expired. An injunction to restrain Jacobus from using the words "Fairbanks' Patent" on his scales was denied, the words not being a valid trade-mark.

In *Cheavin v. Walker*, 5 Ch. Div. 850; 46 L. J. Ch. 265, 686; 35 L. T. N. S. 757; 36 L. T. N. S. 938, the words "Patent Gold Medal Self-Cleaning Rapid Water Filter," etc., on a tablet placed on filters, was held to be merely an inscription and descriptive. James, L. J., said: "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world."

In *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 310, complainant, the licensee of a patented process (called "Heliotype") for making prints, registered the same word as his trade-mark for prints, and had used it for some time in connection with these particular prints. It was held that his right to said mark was limited to prints made under the "Heliotype" process. This decision was under the 77th and 78th sections of Act of July 8th, 1870, 16 *United States Stat. at Large* 210, and the state-

ment filed in the patent office at the time of registration, which sets out that said mark is to be used "in connection with the production and publication of prints," and that "the particular article of trade upon which we have used it is the 'print' which we designate as 'Heliotype.'"

In *Ford v. Foster*, L. R., 7 Ch. App. 611; 27 L. T. N. S. 220, the court said: "There is no doubt, I think, that a word which was originally a trade-mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been cited of Harvey's Sauce (Seton (4th ed.) 237). . . . Then what is the test by which a decision is to be arrived at, whether a word which was originally a trade-mark has become *publici juris*? I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade-mark is simply a right to prevent a trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade-mark, the right to the trade-mark must be gone."

The words "Wheeler & Wilson," although the names of original manufacturers and patentees of a certain kind of sewing machines, being indicative of the plan of manufacture, cannot, after the expiration of the patent, be exclusively appropriated as a trade-mark, but may be employed by anyone making such machines. *Wheeler, etc., Mfg. Co. v. Shakespeare*, 39 L. J. Ch. 36. The court said: "It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of the patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying,

'I have got a trade-mark in the name of a thing which was the subject of the patent.'

In *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298, the phrase "Liebig's Extract of Meat" was refused protection, on the ground that for some time it had been commonly used as descriptive of an article made in a particular way. There was no patent, and the inventor did not seem to care to preserve the right of property in his name. See also *Anderson's Trade-Mark*, W. N. (1883), p. 185; 26 Ch. Div. 409.

The cases on this subject of words indicating process of manufacture, are conflicting, and it seems impossible to reconcile some of them. The doctrine is well established that trade-marks which are employed to designate the ownership and origin of goods manufactured under a *United States* patent for an invention, cannot be held as exclusive property after the expiration of the patent, unless the trade-mark be older than the patents, in which case the interposition of a patent cannot defeat the otherwise valid trade-mark. This doctrine is discussed, *infra*, this title, *Name of Patented Article After Expiration of Patent*, which see. Where, therefore, the trade name or trade-mark, either by virtue of the words used in their natural and necessary meaning, or by association, have come to indicate the patented process of which the goods are manufactured, this trade-mark or trade name becomes public property upon the expiration of the patent, and all who have a right to make the goods by the patented process, have an equal right to designate these goods by the name with which they were christened by the manufacturer under the patent. Goods which are made under a process which is not patentable may be given a trade-mark to indicate their ownership and origin, and this trade-mark will be protected. If the process of manufacture or method by which the goods are made, is not patentable, it will be because the process is either old, or no invention was involved in devising it. If this be the case, then the knowledge of how to make the goods was within the public reach, and every manufacturer had an equal right and equal power to make the goods before they were made by the adopter of the trade-mark. The mere fact that the adopter of the trade-mark was in fact the first person to

make the particular goods or article and put it on the market, should not logically have any influence upon his right to adopt for those goods a trade-mark to indicate the origin and ownership of the particular goods made by him; and yet some of the judges have used language which in its broad signification would indicate that exclusive property in a trade-mark or trade name cannot be acquired by a person who is the actual originator of goods which are not patented, for the reason, as they have stated, that when any new article is put out it must necessarily be christened with a name by which it may be known, and that this name, becoming the only appellation by which it can be distinguished, becomes *publici juris*. See *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144; *Siebert v. Findlater*, 7 Ch. Div. 801; *Leclanché Battery Co. v. Western Electric Co.*, 21 Fed. Rep. 538; *James v. James*, 41 L. J. Ch. 353; *Young v. Macrae*, 9 Jur. N. S. 322; *Hosletter v. Fries*, 17 Fed. Rep. 620; *In re Leonard's Trade-Mark*, 26 Ch. Div. 288.

We think, however, that this doctrine would not apply to articles which, although new in themselves, were the result of a process which was old or which did not require invention to devise it. All other manufacturers being presumed to be possessed of the same knowledge as the maker of the article, had it within their power, prior to his first making the article and giving it a name, to have made the article themselves and given it a name, which would have indicated the article as of their production. They still possess the same right after its manufacture and christening by the first maker, to make the same article and designate it by a different name, to denote their particular manufacture of the article. There is one case which seems to be contrary to this line of reasoning, and it is a case of so much weight that we hesitate to express an opinion different from it. It is the case of the *Celluloid Manufacturing Co. v. Cellonite Manufacturing Company*, 32 Fed. Rep. 94, opinion by Bradley, J. He holds that the word "Celluloid," which was a coined name given to a patented product made by the exclusive manufacturers of it, and used subsequently by the assignees of the original manufacturers, after a long period of time, after the expiration of the patent, became the exclusive trade name and trade-mark property of the original manufacturers

c. PURPOSE OR USE.—Words which describe, in ordinary language, the purpose or use of an article, cannot be protected as trade-marks; but they often form strong evidence of an intention to deceive, and of a likelihood of deception, and hence frequently play an important part in making out a case of unlawful competition in business, which as a general rule controls the decision of trade-mark cases.¹

and their assignees, notwithstanding the fact that the product was patented, and the patents had expired, although the article made under the patents was an entirely new article, was christened by its inventors with the name "Celluloid," and became universally known by that name to so great an extent that the word is now a part of the language, as describing a particular thing made in a particular way, no matter by whom it may be produced, and although the process by which the goods are manufactured has been called by the same name, the "Celluloid" process. In fact, a large class of modified processes by which articles of the same general nature, but varying slightly in composition or quality from that originally made by the first inventor, are made, are all classed under the general generic term "Celluloid" processes. The authority of this case is doubted in *Holt v. Wadsworth*, 41 Fed. Rep. 34. We do not see how it is possible to avoid the logic of the cases in which it has been held that when a name comes to be generic, it becomes *publici juris*, except in the one case which is discussed *infra*, this title, *Exceptions*, where an article old in character is made to a great extent exclusively by one manufacturer, and sold to so great an extent, that the whole class becomes known by the trade-mark name of the particular manufacturer. In this case the fact that the name has to a great extent become generic by acceptance, does not, and cannot, operate to defeat the legally acquired trade-mark rights of the adopter of the mark in it.

1. There can be no trade-mark in the phrase "Magic Headache Cure." *Gessler v. Grieb*, 80 Wis. 21.

In *Harris Drug Co. v. Stucky*, 46 Fed. Rep. 625, the court said: "The words 'Cramp Cure' are descriptive of the purpose and character of the medicine, and cannot, under the rulings, be exclusively appropriated by the manufacturer of a remedy for the disease."

The words "Puddine," "Rose," and

"Vanilla," applied with reference to uncooked ingredients for pudding, cannot be protected. *Clotworthy v. Schepp*, 42 Fed. Rep. 62.

The words "Microbe Killer," applied to a preparation for destroying microbes, are descriptive, and not a valid trade-mark. *Alf v. Radam*, 77 Tex. 530. See also *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122.

In *Humphrey's Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250, the court said: "It cannot be successfully maintained that the words 'Homeopathic Specifics,' standing alone, can be appropriated by any one as a trade-mark; they are too broad, and, if allowed, would give the taker a monopoly in a school of medicine, which Hahnemann, its founder, threw open to all disciples."

There is no right of trade-mark in such words as "cough remedy" or "a sure remedy for chronic or common cough, sore throat," etc., etc. *Gilman v. Hunnewell*, 122 Mass. 139.

The phrases, "Für Familien Gebrauch" and "Lawrence Feiner Familien Flannel" indicate the quality and use, and are not registrable. *In re Lawrence*, 10 Pat. Off. Gaz. 163.

In *Re Roach*, 10 Pat. Off. Gaz. 333, the words, "Croup Tincture," as trade-mark for a croup medicine, were refused protection as being merely descriptive.

"Lieutenant James' Horse Blister," was the name given by the inventor to an unpatented production. It was held that his assignees, after his death, had no right to its exclusive use. *James v. James*, L. R., 13 Eq. 421; 41 L. J. Ch. 353; 26 L. T. N. S. 568; 20 W. R. 434. The court said: "When a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like), may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest that they are made by

f. **INGREDIENTS OF MEDICINES.**—Names of medicinal preparations or articles of manufacture which include the names of medicines or medicinal ingredients, will not be protected as trade-marks, even though the compound or article in which the medicine may be used, is an entirely new article, and the words by exclusive use have come to a great extent to indicate ownership and origin; but if the name of an ingredient be made the basis for a coined arbitrary word, such word may be protected.¹

him." See the criticism of this case in *Thorley's Cattle Food Co. v. Massam*, 42 L. T. N. S. 851.

In *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76, the words "Washing Powder," were held to be not a valid trade-mark. The court said: "He (the claimant) will not be protected in the use of figures, or symbols, or combinations of words which serve merely to indicate the name, kind or quality of the goods to which they are attached, notwithstanding they may be interblended with others which indicate origin or ownership."

1. In *Battle v. Finlay*, 45 Fed. Rep. 796, the word "Bromidia," coined and applied arbitrarily to a medicinal preparation, which nevertheless contained bromide of potassium, was held entitled to protection as a valid trade-mark. The court said: "The word is an arbitrary word, descriptive of nothing unless it is of the complainant's goods, and that only for the reason that the complainants have introduced them to the public under such arbitrary name."

The words "Iron Bitters," indicate the composition of the article so called, and are not a valid trade-mark. *Brown Chemical Co. v. Sterns*, 37 Fed. Rep. 360. This case follows, and the court cites with approval, *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453, wherein the court says: "It goes without saying that the words 'Iron Bitters' are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark." The latter case was subsequently affirmed on appeal to the Supreme Court (139 U. S. 540), where the court, through Mr. Justice Brown, says: "The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark."

The term "Acid Phosphate," applied to a medicinal preparation, is not meaningless and arbitrary, but sufficiently describes the characteristics and qualities of the article, and is not protectible. *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524. The court observing: "The true test, it appears to me, must be not whether the words are exhaustively descriptive of the article designated, but whether in themselves, and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended."

In *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625, the court said: "The word 'Cresylic,' when applied to distinguish an ointment made of soap and the article known in commerce as cresylic acid, is descriptive of the nature and quality of the compound."

The words "Rye and Rock," used to designate a mixture of rock candy and whisky, are not a valid trade-mark. *Van Beil v. Prescott*, 82 N. Y. 630.

Such names as "Ferrated Elixir of Bark, or Elixir of Calisaya Bark with Iron," "Celebrated Remedy for Diarrhoea," etc., indicate the "qualities, ingredients, or composition of the articles," and are not protectible. *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1.

In *Ayer v. Rushton*, 7 Daly (N. Y.) 9, "Cherry Pectoral" was not protected, "cherry" indicating one of the ingredients of the medicine, and "pectoral" the intended application.

The words "Highly Concentrated Compound Fluid Extract of Buchu," are purely descriptive, and incapable of appropriation. *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 453. The court said: "A trade-mark must, in a case like this, as the term imports, be one consisting of a word, an expression, a device, or a mark invented or adopted by the owner, which designates and distinguishes his production from the general manufacture of the same article, and it cannot

g. **GENERIC NAMES.**—Words which were originally valid trade-marks indicating ownership and origin, but which by acceptance and use have lost their meaning of ownership and origin, and come to indicate only quality, are said to have become generic, and are denied protection on the same ground that words which, by their necessary meaning indicate quality, are refused protection.¹

be the appropriation of words belonging to the general public which describe truly a known product."

The phrase "Ferro-Phosphorated Elixir of Calisaya Bark," indicates the ingredients of the medicine to which it is applied, and cannot be protected. *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233.

In *Burnett v. Phalon*, 9 Bosw. (N. Y.) 193; *aff'd* 5 Abb. Pr. N. S. (N. Y. Ct. of App.) 212, the plaintiffs were manufacturers of a hair oil which they sold under the name of "Cocaine," and the defendants began to sell an oil of their own under the name of "Cocaine." An injunction was granted to restrain defendants from so doing, that name being held to be a valid trade-mark, and the property of the plaintiff. *Pierrepoint, J.*, said: "Every man has a right to the reward of his skill, his energy, and his honest enterprise; and when he has appropriated as his trade-mark letters combined into a word before unknown, and has used that word and has long published it to the world as his adopted trade-mark, he has acquired rights in it which the court will protect. . . . No one can appropriate a word in general use as his trade-mark, and restrain others from using that word. Burnett cannot acquire property in the word, gin, wine, brandy, or ale, or in any other word known to the language and in common use to designate things, or the qualities of things. But the word appropriated by the plaintiff is not of that character." *Robertson, J.*, filed a dissenting opinion in the lower court. The doctrine in this case seems to be generally accepted in the *United States*, see *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; but the ruling in *England* seems to be different, see *Linoleum Mfg. Co. v. Nairn*, 38 L. T. N. S. 448; *Leonard v. Wells*, W. N. (1884), p. 60; *In re Horsburg*, 1 Trade-Marks 260; *Cox's Man. of Trade-Mark Cases* 597. See also *Upton on Trade-Marks*, p. 185, where it is said that this doctrine is a departure from the principles announced in the *Amoskeag Mfg. Co. v.*

Spear, 2 Sandf. (N. Y.) 599, and *Williams v. Johnson*, 2 Bosw. (N. Y.) 1.

In *Brown v. Freeman*, 12 W. R. 305; 4 N. R. 476, it was strongly intimated that the word "Chlorodyne," applied to a new medicine by its inventor, was capable of protection. See also *Brown v. Freeman*, W. N. (1873), p. 178.

In *Thomson v. Winchester*, 19 Pick. (Mass.) 214; 76 Am. Dec. 733, plaintiff, an inventor of certain medicines, gave them the name of "Thomsonian Medicines," by which name alone they became generally known. The name having acquired a generic meaning, and the medicines not having been patented, it was held that the name could not be protected.

In *Canham v. Jones*, 2 Ves. & B. 218, the name in question was "Vello's Vegetable Syrup." Vello, the compounder of the medicine, was dead, and neither party claimed any right from him. It was held that the plaintiff, although for a long time the sole manufacturer of the medicine, yet having no exclusive right to the manufacture of the medicine, had no exclusive right to the name.

In *Singleton v. Bolton*, 3 Doug. 293, the compounder of a medicine known as "Dr. Johnson's Yellow Ointment" was deceased, and the words had come to be recognized as the generic name of the medicine. It was held that plaintiff, although he, and his father before him, had long manufactured it under this name, had no exclusive property in the name.

1. Under this head fall all of the cases of expired patents where the trade-mark has designated a patented article during the life of the patent; but as a general rule, in other cases, a name seldom, if ever, becomes generic except by abandonment. It is true that cases do exist, and may occur, in which a new article is made and put on the market by a manufacturer and given a name by which it becomes known, and which becomes its generic name to so great an extent as to make it impossible for the originator subsequently to assert a monopoly in the

name itself. Still, we think that all of these cases, wherever they have occurred or may occur, may be decided by the test laid down in the text, *supra*, this title, *Words Indicating a Process of Manufacture*, that if the article is essentially new, it must be the result of patentable invention. If it is the result of a patentable invention, the monopoly can only be protected by the patent laws, and with the expiration of the patent the trade-mark will become public property. If the article is not the result of invention, then it cannot be said to be so essentially new, either in itself or in its process of manufacture, that the names given to it by the first manufacturer should be said to be generic.

When a preparation has become known by the name of the original manufacturer (*e. g.*, "Ward's Liniment"), a third person, manufacturing it, has no right to the exclusive use of such name; and this, it seems, in spite of the fact that he has been granted by the original manufacturer all the rights which he had in the name. *Watkins v. Landon*, 52 Minn. 389.

One Weymouth invented and took out a patent for a certain kind of hay-knives. The patent was assigned to Holt, who, after some time, adopted the trade-mark "Lightning" for these knives. They became known to the trade as "Weymouth's patent" and "Lightning" hay-knives. It was held that the word "Lightning" was a valid trade-mark during and after the expiration of the patent, but the words "Weymouth's Patent," after the expiration of the patent, could not be exclusively appropriated. In *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34, Wallace, J., said: "If the case of *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 99 (the 'Celluloid Case'), contains any opinion opposed to the view that the defendants have the right to print the words 'Weymouth's Patent' upon hay-knives sold by them similar to the patented article, it is not acceded to, and is antagonistic to the cases of *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337, and *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276."

The word "Reverse," applied to a game of cards, one of the features of which is a system of reversing, is not a "fancy" word under the act of 1875. *Waterman v. Ayres*; *In re Waterman's Trade-Mark*, 39 Ch. Div. 29.

The court said: "I think that an ordinary Englishman, not knowing foreign languages, would consider 'Reverse' as in some way intended to describe turning over or reversing." It was held, also, that a name which has been given to a new article, and which is the only name whereby it is known, cannot be a fancy word as regards that article.

The word "Gem," applied to air-guns, becoming, after three years' use, descriptive of the gun, is then registrable. *Arbenz's Appeal*, 35 Ch. Div. 248. Lopes, L. J., said: "The rule, in my opinion, is that where a name or word was originally, or has come to be, descriptive of the article to which it is attached, so that, while indicating what the article is, it does not connect that article with any particular manufacturer, such name or word cannot be registered as a trade-mark." With reference to the word "Gem" itself, the same judge says: "I think, whatever it may have been originally, it is not now a fancy word. I think it indicates commendation of the article, and is therefore descriptive, and not a fancy word within this section."

In *Re Leonard's Trade-Mark*, *Leonard v. Wells*, 26 Ch. Div. 288, Cotton, L. J., said: "Now, in my opinion, when a man invents a new article, and invents a word as descriptive of that article, then if all the world are at liberty to make that article, he stands in a very great difficulty as regards claiming to himself the exclusive use of that name which he has invented to describe the article. It is not, however, necessary to give an opinion upon that question, etc."

Semble, that the name of a patented article (*e. g.*, "The Home-Washer," applied to a washing machine), which has become known in the trade, is not a fitting trade-mark after the expiration of the patent, since it would have the effect of extending the patent beyond its legal limit. *In re Ralph's Trade-Mark*, 25 Ch. Div. 194.

In *Hostetter v. Fries*, 17 Fed. Rep. 620, it is held that there is no trade-mark in the words "Dr. J. Hostetter's Stomach Bitters." The court said: "When a new article is made, a name must be given to it, and this name becomes by common acceptance the appropriate descriptive term by which it is known, and therefore becomes public property."

In *Marshall v. Pinkham*, 52 Wis.

572; 38 Am. Rep. 756, the court said: "It would also seem to follow, from the cases cited, that on the death of old Samuel Marshall (assuming that no one succeeded to the good-will of his business), any citizen would have the legal right to manufacture liniment composed of the same ingredients and made in the same way as he manufactured that sold by him, and also, in making sales, to describe it as such. Upon that assumption the words 'Old Dr. S. Marshall's Celebrated Liniment' were merely descriptive of the compound, and, if truthfully applied by the defendant in making sales, no one could rightfully complain, as no one had any patent upon it, or exclusive right to the use of any words which aptly described it. Upon his death, with no successor to the good-will of his business, those words would cease to indicate origin or ownership, and hence cease to be a trade-mark."

In *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527, the court said: "It is now so well settled that it is no longer necessary to cite authorities, that a trade-mark may consist of marks, forms, symbols, or even words in common use, provided they are used in such a way as to designate the true origin or ownership of the article, and have not already been appropriated by others in connection with the same article. In case of prior appropriation of part, or parts, by others, the combination of the plaintiff, as a whole, must be new, and intended and calculated to designate ownership or origin. No right accrues to the use of mere generic words used to designate the article or its quality."

In the case of *In re Hall*; *In re Atkinson*, 13 Pat. Off. Gaz. 229, it was held that although "Calhoun," on plows, was originally a valid trade-mark of the firm of Calhoun & Atkinson, yet, having become, by reason of use by others without any opposition of the representatives of said firm, *publici juris*, registration must be denied it.

The words "Angostura Bitters" had become the term by which a certain medicinal preparation was generally known. It was held that they could not be exclusively appropriated, in case the secret of the manufacture of the article should become known, there being no patent right. The court said: "It is to be observed that the person who produces a new article and is the sole maker of it, has the greatest diffi-

culty (if it is not an impossibility), in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from." *Siebert v. Findlater*, 7 Ch. Div. 801; 26 W. R. 459. The term "Angostura" is also geographical. See also *Siebert v. Abbott*, 61 Md. 276; 48 Am. Rep. 101.

The words "Holbrook's School Apparatus" (Holbrook being the name of the original manufacturer), having been used by others without opposition, are descriptive and generic, and not entitled to protection. *Sherwood v. Andrews*, Chicago Super. Ct., *5 Am. L. Reg. N. S. 588.

In *Young v. Macrae*, 9 Jur. N. S. 312, plaintiff was the owner of a patent for distilling "Paraffine Oil," and defendant began to sell another oil under the same name. It was held, that although a fancy name, "and the more ridiculous it is, the better it is," will be protected if it indicates ownership, etc., yet where a person "has found out an article which is a natural product, and has given that natural product a name," such name designates the product, and may be commonly used.

In *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144; 13 How. Pr. (N. Y.) 385, the name "The Balm of Thousand Flowers," applied to a cosmetic, was held not to be a valid trade-mark. The court, by Duer, J., said: "It is not necessary to deny, that a name may in some cases be rightfully used and protected as a trade-mark, but this is only true when the name is used merely as indicating the true origin and ownership of the article offered for sale—never where it is used to designate the article itself, and has become by adoption and use its proper appellation. When a new preparation or compound is offered for sale, a distinctive and specific name must necessarily be given it. The name thus given to it, no matter when or by whom imposed, becomes by use its proper appellation, and passes as such into our common language. Hence, all who have an equal right to manufacture and sell the article, have an equal right to designate and sell it by its appropriate name, the name by which alone it was distinguished and known. . . . In short, an exclusive right to use on a label, or other trade-mark, the appropriate name of a manufactured article, exists only in those who

h. EXCEPTIONS.—It sometimes happens that a name, which at the time of its adoption had been a valid trade-mark, has, by long use and association with goods of a particular kind, come to be used for the purpose of describing the kind, character, and quality of the goods; but although this may be true, and the name thoroughly descriptive in this sense, still the trade-mark will be protected because it would be the height of injustice to an honest trader, who, by the expenditure of his time, labor and money had so widely extended the knowledge of his goods that his valid trade-mark had come to describe their character, quality, and ingredients to deprive him of the fruit of his labor just when it was most valuable to him.¹

have an exclusive property in the article itself." But in *Petridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156, decided just after the above, Hoffman, J., expressed the opinion that the phrase "Balm of Thousand Flowers" is "extrinsic and not indicative," and is a valid trade-mark.

1. In *Lloyd v. Merrill Chemical Co.*, 25 Ohio L. J. 319, plaintiffs, discovering salt obtained from "wintergreen," with antiseptic qualities, gave it the name "Asepsin," to indicate the antiseptic qualities of the salt, and registered the same as a trade-mark. It was held that, the word being new, it was not an invalid trade-mark because suggesting the qualities of the article. See *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34. See *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. Rep. 776; 138 U. S. 537, set forth *supra*, this title, *Grade*.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, Bradley, J., said: "When the word ('Celluloid') was coined and adopted, it was clearly a good trade-mark. The question is, whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right. It seems to me that it cannot. As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one; it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to, and stamping it upon, the article."

But see *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712, where complainant failed to restrain the use of "Celluloid" as applied to starch or in the firm name of the company making starch, on the ground that so applied

it was fanciful, and not apt to deceive the public.

In *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169, Judge Rapallo, in delivering the opinion of the court, after reviewing many cases on the subject, concludes as follows: "Our conclusion is, that where a manufacturer has invented a new name (as 'Sliced Animals,' 'Sliced Birds,' 'Sliced Objects'), consisting either of a new word or a word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article." This leading case has been approved in the *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, in the opinion by Mr. Justice Bradley, and also in *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712, in the opinion by Mr. Justice Shipman.

In *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679, registration was asked for the word "Mason," in the collocation "Mason's Fruit Jar." The court said: "The fact that the owners of a trade-mark also owned certain patents with which it was connected, did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole and not merely certain parts of it, have terminated the existence

2. **Color.**—The color of a label, wrapper, capsule, or package alone, cannot be protected as a trade-mark, but, like "Directions for Use," is often strong evidence of an intention to deceive and a likelihood of deception. Color is one of the most marked indicia of a package, label, or dress of an article, and when other elements combine with the color to make up an imitation of an article of established reputation, the likelihood of deception is great, and the courts are not slow to enjoin the acts of the defendant.¹

of the trade-mark 'which had been used during the life of the patent. . . . While the fact that the term has become generic would be fatal to its subsequent adoption by these or any other applicants, it certainly is not fatal to its continued use, or to its registration by the lawful assignees of those whose use rendered it generic, any more than to its continued use or registration by the assignors themselves. Otherwise a trade-mark, as soon as it should become valuable enough to be generic, would expire."

In *Carrick v. Morson*, L. J. Notes of Cas. (1877), p. 71; Cox's Man. of Trade-Mark Cases 543, the word "Lactopeptine," applied to a medicine of plaintiff's invention, was protected as a valid trade-mark.

The names "Turin," "Sefton," "Leopold," or "Liverpool," applied to certain trousers to distinguish certain patterns, are capable of being exclusively appropriated. *Hirst v. Denham*, L. R., 14 Eq. Cas. 542. In this case the plaintiff was the inventor of at least three of the patterns. The court said: "When a manufacturer has produced an article of merchandise, calling it by a particular name and vending it with a particular mark, he has acquired an exclusive right to the use of such name and mark, which becomes what is usually called his trade-mark, and is entitled to prevent all other persons from using such name and mark to denote articles of a similar kind and appearance."

In *Davis v. Kendall*, 2 R. I. 566, the inventor of a compound called it "Pain-Killer," prefixed by his name and the word "Vegetable." The court said: "The plaintiff has no patent and no exclusive right to the compound called 'Pain-Killer.' He invented the compound and gave it the name 'Pain-Killer,' and this seems to have been the first application of the term to a medical compound. The plaintiff,

though not entitled to the compound, is entitled to his trade-mark, and the law recognizes and will protect this right." The case was, however, decided on the ground of deception.

In *Davis v. Kennedy*, 13 Grant. Ch. (U. C.) 523, the name "Pain-Killer" was protected as being fancy and sufficiently arbitrary. In *Davis v. Harbord*, 15 App. Cas. 316, it was held by two Lords, JJ., that the term was not special and distinctive within the Act of 1875, § 10.

1. In *Coats v. Merrick Thread Co.*, 149 U. S. 562, Brown, J., said: "There is, no doubt, a general resemblance between the heads of all spools containing a black and gold label, which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the center of the label, etc. Having done this, we think they are relieved from further responsibility. If the purchaser of such thread desires a particular make, he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself, the lettering upon the spools. He is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer."

In *Von Mumm v. Frash*, 56 Fed. Rep. 830, Benedict, J., said: "They (the defendants) should also be prohibited from placing the words 'Extra Dry' upon any bottles of their product, of the character that has been described, either in combination or otherwise. This upon the ground that the words 'Extra Dry,' as applied by them to the article they manufacture, constitute an untrue and deceptive representation, made, not for the purpose of description, but for the purpose of fraud, and which is calculated to deceive, to the injury of the complainants. They must also, upon the same grounds, be prohibited from surrounding the neck and cork of a bottle of the form generally used to contain champagne wine, which contains their product as herein described, a rose-colored capsule of metal, whether stamped with the words 'Extra Dry,' and an imitation of the complainants' trade-marks, as in the exhibit before the court, or otherwise. The rose color in question may doubtless be lawfully used in other ways than in the way indicated. But the use which the defendants make of the rose color, in connection with a metal capsule upon bottles of the form usually employed to contain champagne wine, which contain their product, is accompanied with a fraudulent intent, and when so used constitutes an untrue and deceptive representation, which may well be forbidden by a court of equity. No injury to the defendant can follow such a prohibition as I have decided. The public will be protected thereby from fraud, and the complainants relieved from danger of injury. If any doubt can be fairly entertained as to defendants' purpose in using a rose-colored capsule in the way they do, as was said by Judge Wallace, in *Association v. Piza*, 24 Fed. Rep. 151, 'it is not unreasonable to resolve any doubt that may remain in favor of the complainants.'"

In *Babbitt v. Brown* (Supreme Ct.), 23 N. Y. Supp. 25, Van Brunt, J., said: "In the case of *Morgan v. Troxell*, 89 N. Y. 293, it was expressly held that a party cannot acquire a trade-mark simply in the form and color of the package or the manner in which it is wrapped, and that mere general resemblance forms no ground for interference, as the products of dealers can be distinguished only by the brands, marks, or names which may be put upon them, and these can be protected

as trade-marks only as far as they are new and comply with the other conditions necessary to constitute a trade-mark. When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material; but, to sustain an action, there must be an imitation of something that can be legally appropriated as a trade-mark. The only resemblance seems to be in the size and color of the wrappers, and in such size and color, as already suggested, the plaintiff cannot acquire a trade-mark."

In *Fischer v. Blank* (Supreme Ct.), 19 N. Y. Supp. 65, Andrews, J., said: "The packages of the defendant are of the same shape and size as those of the plaintiffs; the paper of the wrappers is of the same color; the pictures and symbols are of the same color; the size and color of the labels on the end are the same. The pictures and symbols, though different from those on the plaintiffs' packages, are arranged in a similar manner. The differences between the packages can be seen upon a close inspection, but without such inspection the general appearance of the defendant's packages is so nearly the same as that of the plaintiffs' packages that any person, whether illiterate or not, if making a purchase in a place where the light was not good, would readily mistake the packages of the defendant for those of the plaintiffs; and such inspection satisfies us that the object and the intent of the defendant was to put up his tea in packages so similar to those of the plaintiffs that they would be mistaken for the packages of the latter, and yet that the differences upon the wrappers should be such that the plaintiffs would not be able to maintain an action."

In *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205, Paxson, C. J., said: "There is no trade-mark shown nor alleged which it is charged the defendant has pirated. On the contrary, the bill alleges that the plaintiff manufactures a peculiar kind of horse-shoe nail. It is known to the trade as a bronzed nail, being covered with a coating of bronze. . . . The bill charges that the defendant is selling a precisely similar nail; that it is bronzed like those of plaintiffs, to deceive purchasers, and induce them to purchase them as plaintiff's nails. The defendant has not imitated its label, for it has none. He has not even imitated the plaintiff's man-

ner or style of putting up its packages. There is nothing beyond the mere averment, that he makes a similar nail. We have never yet carried the doctrine of trade-marks to the extent claimed for it by the plaintiff. We have never hesitated to restrain the imitation of a trade-mark, when the fact justified it. We are now asked to go one step further, and protect the manufacture of the article itself. This we do not see our way clear to do. The manufacture of a particular article can only be protected by a patent. The law in regard to trade-marks should not be pushed to the extent of interfering with manufactures."

In *Mumm v. Kirk*, 40 Fed. Rep. 589, Cox, J., said: "The complainants use a rose-colored capsule upon bottles containing wine made by them known as 'Extra Dry.' They seek by this suit to prevent the defendant from using a capsule of similar color. . . . It was necessary for him to use a capsule of some kind. Almost all colors harmonious for this use, such as gold, silver, and white, had previously been appropriated by other dealers in champagne. He could hardly select a capsule without coming in contact with some of them. He chose rose color, as he had a right to do. If he had simulated the complainant's labels in other respects, a different proposition would have been presented."

In *Fleischmann v. Newman* (Supreme Ct.), 4 N. Y. Supp. 642, Macomber, J., said: "The manufacture of this article is open to all competitors, and they cannot be held liable in any action to restrain them, where they plainly put their name upon the label, even though they do happen to use light yellow for the background of the paper upon which the description of the commodity is given."

In *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324, Wheeler, J., said: "The plaintiffs insist that their long use of these words and figures, displayed in these forms and colors upon their labels on the central parts of their spool-heads of light-colored wood, has made the mere appearance of the spools, without reading the labels, a representation that the thread is of their manufacture, etc. . . . Whether the appearance amounts to such a representation, is a question of fact to be determined on the evidence. Black and gilt labels appear to have been used by others on spools of thread

nearly and perhaps quite as early as by the plaintiff." *Affirmed* 149 U. S. 562.

In *Re Hanson's Trade-Mark*, 37 Ch. Div. 112, Kay, J., said: "It is the plain intention of the act that, where the distinction of the mark depends upon color, that will not do. You may register a mark, which is otherwise distinctive, in color, and that gives you the right to use it in any color you like, but you cannot register a mark of which the only distinction is the use of a color, because practically, under the terms of the act, that would give you a monopoly of all the colors of the rainbow."

In *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767, Scholfield, J., said: "It is well settled, moreover, that directions, advertisements, notices, etc., constitute no part of a trade-mark, and that no one can obtain a trade-mark in the form, appearance, or finish of his goods, so that another cannot lawfully make his goods like them. Nor can there be a trade-mark in the form or color of a package or box. . . . The boxes in which appellees' corsets are placed to be sold, are of the same shape, size, and general color as those in which appellants' corsets are placed to be sold. It does not appear, however, that there is anything unusual in the shape or structure or color of these boxes, and so far as we perceive, this similarity may result from the use required, and the convenience of the makers of the boxes; at all events, it does not appear that this may not be so, and we regard it a reasonable inference in the absence of all proof as to the purpose or motive."

In *Fleischmann v. Starkey*, 25 Fed. Rep. 127, Colt, J., said: "The position is taken by the complainants that the essential part of their trade-mark consists of a label having a yellow color, and that, therefore, they cover all yellow colored labels used upon compressed yeast, and that the use by the defendant of a yellow colored label upon the compressed yeast made and sold by him, constitutes an unlawful imitation of their trade-marks. . . .

The color of a label, apart from a name or device, can hardly be the subject-matter of a trade-mark. The effect would be that a single manufacturer might acquire the exclusive right to the use of labels of a certain color, or to the colored paper in which his goods might be wrapped. This might

seriously interfere with trade and with legitimate competition."

In *Ev. p. Landreth*, 31 Pat. Off. Gaz. 1441, Butterworth, Commissioner, said: "The matter presented is a red bag to be used for seed-peas. . . . There is no limitation in respect to the matter claimed as essential in this case, except the color of the receptacle. As to shape and material, it is limited to nothing, except that it must be such material as can be made into a bag—paper, canvas, silk, leather, etc., any textile stuff capable of receiving a red color—and the bag may be of any shape or size, an envelope, a lady's reticule, a gunny-sack, as well as the particular canvas bag shown in the exhibits.

. . . The conclusion to be drawn from these various decisions (cited in case) is that neither the color alone, nor the form alone, of a package, nor the color alone of an article of commerce can constitute a trade-mark.

. . . As words, characters, and symbols, descriptive in their application to any merchandise, cannot be appropriated by anyone to his exclusive use, for the same reason, ordinary materials sold in the market and capable of employment for manifold uses, cannot be exclusively appropriated to any particular one of these uses by any one.

. . . Red materials, suitable for bags, being commonly on sale and in use, there can be no legal restrictions upon their use by any person for any lawful purpose that suits his convenience. If the contrary were true, if it were in the power of the applicant to appropriate to his own use a red bag for peas, it would be equally in the power of the next man to appropriate a blue bag to the same merchandise, and the next a green bag, and so on. Who can say where the line must be drawn? Is there any reason why the trader who chooses should be prevented from adopting a white bag to distinguish his goods, if the door is once opened? Such a suggestion needs no answer. There can be no restriction on the use of white paper or fabrics for any lawful purpose, and the examiner can see no reason why this is not just as true of red cloth and red paper, or of cloth or paper of any hue or shade commonly sold and used."

In *New York Cab Co. v. Mooney*, 15 Abb. N. Cas. (N. Y.) 152, Lawrence, J., said: "As I have already observed, my examination of the affidavits convinces me that the defendant's design

is to induce the public to believe that his cab is the property of the plaintiff, and that the device which he has adopted and the color to which he has resorted, were adopted and resorted to for the purpose of misleading the public in that respect. By this I do not mean to say that the plaintiff is entitled to any exclusive property in color or words, but I am clearly of the opinion that it has so far established a trade-mark in the words, and colors, and device, as they are combined and used upon its cabs, as to entitle it to call upon a court of equity for protection against imitations designed to mislead the public and to deprive the plaintiff of its profits."

In *Sawyer v. Horn*, 4 Hughes (U. S.) 239, Morris, J., said: "The red top being, as to its use, a covering for the perforations in the metal top, and as to its color and material one of the most common of all the cements used to close and seal the mouths of jars, bottles, cans, and similar packages, and there being impressed on it no mark or design, it cannot, we think, be said to be a trade-mark, and cannot be exclusively appropriated by the complainant; nor can the form of his box, it having been decided not to be a patentable contrivance, be monopolized by him; nor can the color of the label, nor the allocation of words thereon, nor the type, be exclusively appropriated. . . . But we do find that the respondent has been guilty of improper and inequitable conduct, to the injury of the complainant, in having designedly so put up, labeled, and packed his goods that purchasers for whose use they are intended, are misled and deceived."

In *Enoch Morgan's Son's Co. v. Schwachhofer*, 55 How. Pr. (N. Y. Supreme Ct.) 37; 5 Abb. N. Cas. (N. Y. Supreme Ct.) 265, Lawrence, J., said: "It is claimed that the plaintiffs cannot have an exclusive right to use tin-foil or ultramarine blue-colored paper in putting up their article, as such paper is much used for ordinary commercial purposes. This is true, but the cases cited show that the courts will interfere where it is apparent that there is an imitation of the plaintiff's label, whether as to color, shape, or inscription, which imitation is calculated and intended to deceive the general public. The evidence satisfies me that the blue wrapper, as used by the defendant, is calculated to deceive purchasers, and I think it is very clearly

proven that the ordinary purchaser is deceived by the similarity of the dresses in which the soaps are put upon the market."

In *McLean v. Fleming*, 96 U. S. 255, Clifford, J., said: "Mention may also be made of the fact that the color of the label and the wax impression on the top of the box, are well suited to divert the attention of the unsuspecting buyer from any critical examination of the prepared article."

In *Frese v. Bachof*, 13 Pat. Off. Gaz. 635, Wheeler, J., said: "The orator claims that his firm and their predecessors have long been accustomed to pack this article in long cylindrical packages with pink wrappers, and to have crimson papers of directions, and yellow ones of warning, tied in with each package, and their firm name painted across a white label, etc., so that the package by its form and colors would be at once known by its general appearance without taking time to read anything on it, and that their wares have come to be well known as theirs by the appearance of the packages. . . . Probably no mere form of a package would ever alone amount to a representation capable of indicating that the wares contained in it were those of any particular make. But when the form of the packages, the color of the wrappers, and the papers done up with them, and the form and color of the labels are considered all together, it is quite apparent that when they have been so long used by the orator's firm for holding this particular compound, when offered for sale, the mere appearance of the package would amount to a representation that they contained that article of manufacture."

In *Lea v. Wolf*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 389, Ingraham, J., said: "Upon the second question, as to labels and wrappers, I am of the opinion that the plaintiff is entitled to the injunction. The color of the paper, the words used, and the general appearance of the labels when used, show an evident design to give a representation of those used by the plaintiff, and the directions for using are an exact copy of those used by the plaintiff. It is impossible to adopt any conclusion other than that the intent was to lead purchasers, from the general appearance of the article, to suppose that it was the original Worcestershire sauce which they were buying. It is true that the defendants have substituted

their name as the manufacturers, but that alone will not relieve the defendants from the charge of an attempted imitation of the labels and wrappers of the plaintiff, for the purpose of misleading purchasers."

In *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521, Daly, J., said: "An inspection of the two labels shows that the one afterward used by the defendants, and the use of which the plaintiffs seek to restrain by injunction, was, in respect to form, color, words and symbols, so like the former as to make it manifest that the design of the defendants in using it was to deceive, the resemblance being such as would be likely to impose upon ordinary purchasers. . . . It was alike in the size and form of the label; in the color of the paper, a peculiar, delicate gray tint."

In *Faber v. Faber*, 49 Barb. (N. Y.) 357, Sutherland, J., said: "Nor can I see upon what ground the plaintiff can complain of the manner in which the defendant Faber's pencils are put up for the wholesale market. The plaintiff certainly has no right to the exclusive use of a particular colored paper, or kind of paper, for covering or inclosing his pencils by the gross in a book form, or any other particular form."

In *Williams v. Spence*, 25 Abb. Pr. (N. Y. Super. Ct.) 366, Monell, J., said: "Although there are some marks of dissimilarity, both in the labels, devices, and hand-bills, yet the prominence given to the name 'Yankee Soap,' the inferiority of the size and shape of the cakes, the covering of tin-foil, the color of the labels, the size and shape of the boxes, the almost literal adoption of the language used in the plaintiff's labels and hand-bills, overwhelm the small marks of difference which the defendants hoped would relieve them from the consequence of using the plaintiff's trade-mark."

In *Williams v. Johnson*, 2 Bosw. (N. Y.) 1, Woodruff, J., said: "They (the plaintiffs) have adopted in reference to their manufacture (of an article which any and everyone may manufacture and sell if he please), a form and size of cake, a particular mode of covering and packing, a combination of three labels on each cake, an exterior hand-bill upon the box, and have so arranged the whole as to suggest, to any one desiring to purchase their soap, upon an inspection, that the article is theirs, and made by them, like that heretofore

3. Form of Article or Package.—The form of an article or package alone can rarely be the subject of trade-mark protection. If the form is peculiar enough to be protected for itself alone, it may be the subject of a design patent; but the form of an article or package, like the color and other indicia, is to some extent arbitrary, because the vendor might have adopted almost any form for the packing of his goods, and having adopted and adhered to one particular form until it has become well known to the public, he will be protected in it so far as the court can go without creating unlawful monopolies or appropriating public property to private use without legal grant.¹

made, sold, and known as their manufacture. All this the defendant has copied, with an exactness which is calculated to deceive even the wary, much more to entrap those who are not in the exercise of a rigid scrutiny. . . . We have no hesitation in saying, that his acts are a clear infringement of the plaintiffs' rights. He has copied the form, appearance, color, style, and substantial characteristics in all respects, which distinguish the plaintiffs' goods."

In *Croft v. Day*, 7 Beav. 84, the M. R. said: "It is truly said, that if any one takes upon himself to study these two labels, he will find several marks of distinction. On the other hand, the colors are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me that there is quite sufficient to mislead the ordinary run of persons." See also *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767; *Mooreman v. Hoge*, 2 Sawyer (U. S.) 78.

1. In *Brown v. Seidel*, 153 Pa. St. 60, the court said: "We are not prepared to say that the mere resemblance, accidental or otherwise, in the size and style of putting up packages, is of itself sufficient to justify the interference of a court of equity."

In *Fischer v. Blank*, 138 N. Y. 245, Maynard, J., said: "The plaintiffs have no proprietary right to this form of package, and are not entitled to its exclusive use. It is a convenient form in which to inclose merchandise of this character, when offered for sale, and all who are engaged in the traffic in the commodity, are free to use it without incurring the risk of liability for an infringement of the plaintiffs' rights. It has been too often reiterated, to be

now questioned, that, under ordinary circumstances, the adoption of package, of a peculiar form and color alone, having no distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade-mark."

In *Hoyt v. Hoyt*, 143 Pa. St. 623, Williams, J., said: "The trade-mark must relate to and distinguish the goods to which it is applied. For this reason, among others, the size, or shape, or mode of construction of a box, barrel, bottle, or package in which goods may be put, is not a trade-mark. If there is any new and useful combination in the construction of such box or package, it should be patented as an invention, if the owner wishes to prevent others from using it; but such package cannot be registered as a trade-mark." See *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324; *affirmed* 149 U. S. 562.

In *Evans v. VonLaer*, 32 Fed. Rep. 153, Colt, J., said: "Stress is laid upon the fact that the bottles are alike, but, bearing in mind that the evidence discloses that most lime-juice bottles are quite similar in size and design, I do not deem this very important."

In *Adams v. Heisel*, 31 Fed. Rep. 279, Welker, J., said: "It is well settled that a person cannot obtain the monopoly incident to a trade-mark by the mere form of a vendable commodity that may be adopted. In this case, the complainants could not obtain a trade-mark for the form of the sticks of chewing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes. These qualities and forms are common to the manufacture, and may be made similar, without injury to others who may use the same forms."

In *Moxie Nerve Food Co. v. Baum-*

bach, 32 Fed. Rep. 205, Sabin, J., said: "And, again, I would inquire when particular words, or things of common use, or theretofore known and used by the public, are used and appropriated by a party, in connection with his trade-mark, upon a manufacture of an article of commerce, whether the use of such common terms or articles for similar packages by another party can be enjoined from use upon like or simulated preparations manufactured by such other party, bearing in part a similar but different name, but put up in such a manner as to delude an unwary consumer of the article? While it is clear that words or articles of common use could not be enjoined, if used upon other preparations, yet, if used upon like or simulated preparations of same flavor, taste, and appearance, it seems to me that they can; and particularly when the first party using the same, in connection with his trade-mark and style of package, has established such a use of the same, and an intimacy between himself, it, and the public, as to become a matter of value by way of preventing deceit. A champagne bottle, for instance, is a thing long and well known by the public, and any person, under ordinary circumstances, may lawfully use the same in putting up any preparation therein. But when a manufacturer of a hitherto unknown fluid or beverage, as an article of commerce, has a trade-mark therefor, and introduces such article of commerce to the public in a champagne bottle, with a particular kind of label or trade-mark affixed thereto, . . . and thereafter another party or manufacturer, finding such article to be in great demand, introduces an article of like taste, color and appearance, claiming to be for similar use or purpose and with a label sufficiently like the former, . . . I think, that he might be and ought to be enjoined from embarrassing his neighbor and misleading the public by using a champagne bottle in putting up his preparation." This case was approved in *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248.

In *Re James Trade-Mark*, 33 Ch. Div. 392, Cotton, L. J., said: "The appellants cannot claim any monopoly in the shape in which they sell their black lead." Lindlay, L. J., said: "Of course the plaintiffs in this case have no monopoly in black lead of this shape. Anybody may make black lead of this shape, provided he does not mark it as

the plaintiffs mark theirs, and provided he does not pass it off as the plaintiffs' black lead. There is no monopoly in the shape, and I cannot help thinking that that has not sufficiently been kept in mind."

In *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767, Scholfield, J., said: "It is well settled, moreover, that directions, advertisements, notices, etc., constitute no part of a trade-mark, and that no one can obtain a trade-mark in the form, appearance or finish of his goods, so that another cannot lawfully make his goods like them." See *Davis v. Davis*, 27 Fed. Rep. 490.

In *Alexander v. Morse*, 14 R. I. 153; 51 Am. Rep. 369, Carpenter, J., said: "We find that respondents have used, although perhaps only to a small extent, bottles precisely similar in size and form to those used by the complainants, and having formed in the substance of the glass on the back of the bottle the words, 'Dr. Morse's Celebrated Syrup,' in precisely the same form as used by the complainants. . . . The proof shows that the form of the bottle is not peculiar to the complainants, but that the same form is in use for other purposes. It does not, however, appear that it is in use by others than the parties for the sale of 'Yellow Dock Compound,' or that any other persons use bottles having the words 'Dr. Morse's Celebrated Syrup' on the back. . . . We think, on the whole, that the respondents have infringed the rights of the complainants by using the bottle having the same form as those used by complainants, and having the same words formed in the substance of the glass."

In *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625, Pardee, J., said: "Complainants ought in equity and good conscience to be protected from the imitation of their packages, so far as they are peculiarly designed and shaped for the purpose of distinguishing complainants' goods, and from the imitation in color, design, style and lettering combined of the labels used to make said packages, when put on the market; and complainants ought to be protected, as against the present defendants, from the introduction and sale of all such goods as are put up in such imitated packages and marked with such deceptive labels."

In *Wilcox, etc., Sew. Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; 24 Pat. Off. Gaz. 1272, Wheeler, J., said:

"While no one has the right to sell his own wares as the wares of another, everyone has the right to make and sell any wares not protected by patents. Marks, symbols, or dress placed upon the wares might unlawfully misrepresent their source, but when left to speak for themselves alone there could be no wrongful misrepresentation."

In *Enoch Morgan's Son's Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294; 11 Abb. N. Cas. (N. Y.) 86, *Rapallo, J.*, said: "The only points of similarity between the two articles sold are, that they are both small cakes of soap covered with tin-foil or tinned paper, and having a blue band around them with gilt lettering. The cakes are not even of the same shape, one being nearly square, and the other an oblong. But we are of opinion that this form of package, with a blue band and gilt lettering, could not be appropriated by the plaintiff as a trade-mark. There is nothing peculiar about it and it is an appropriate and usual form in which to put up small cakes of soap, and the law of trade-marks has not yet gone so far as to enable a party to appropriate such a form or package and fashion of label and exclude every one else from its use, or from the use of anything resembling it. If it had, the different forms and fashions of cigar boxes, packages of chewing tobacco, perfumery, . . . would afford food for litigation, sufficient to give constant occupation to the courts. . . . When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material; but to sustain an action there must be an imitation of something that can be legally appropriated as a trade-mark."

See also *Enoch Morgan's Son's Co. v. Troxell*, 57 How. Pr. (N. Y. Supreme Ct.) 121.

The device of a "drum" for holding collars, with nothing more to identify it, does not constitute a valid trade-mark. *White v. Schlect*, 14 Phila. (Pa.) 88.

In *Sawyer v. Horn*, 4 Hughes (U. S.) 239, *Morris, J.*, said: "The form of the box, it having been decided not to be a patentable contrivance, cannot be monopolized by him. . . . But we do find that the respondent has been guilty of improper and inequitable conduct to the injury of the complainant, in having designedly so put up,

labeled and packed his goods that purchasers for whose use they are intended, are misled and deceived, and do get Horn's blue when they desire and suppose they are getting Sawyer's."

In *Dausman, etc., Tobacco Co. v. Ruffner*, 15 Pat. Off. Gaz. 559, *Blodgett, J.*, said: "Any manufacturer of goods which are sold by the piece, such as cloths, for instance, must have the right by marks or lines to indicate where to cut, in order to remove each yard, or part of a yard, or other specific quantity. So in regard to liquids put up, for instance, in glass bottles or similar packages, lines might be drawn, showing the half, etc.; and no manufacturer, by registering a trade-mark upon a package of that kind, could prevent another manufacturer from thus showing how a measured portion of the contents of his package might be withdrawn."

In *Rose v. Loftus*, 38 L. T. N. S. 409, *Malins, V. C.*, said: "I lay it down as a general rule that it is not justifiable for a trader to fill bottles, or casks, or anything else bearing a known name, so as to induce the public to believe that the thing contained in those vessels is the production of the man whose name they bear; because by doing that he puts it in the power of a person selling these goods to impose on the public."

In *Frese v. Bachof*, 14 Blatchf. (U. S.) 432, *Wheeler, J.*, said: "Probably no mere form of a package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any particular make. But, when the form of these packages, the color of the wrappers and papers done up with them, and the form and color of the labels, are considered all together, it is quite apparent, that when they had so long been used by the orator's firm for holding this particular compound when offered for sale, the mere appearance of the packages would amount to a representation, that they contained that article, of that manufacture."

In *Re Gordon*, 12 Pat. Off. Gaz. 517, *Doolittle, Acting Commissioner*, said: "The box, barrel, or wrapper, containing merchandise, whatever its form, cannot, *per se*, be the trade-mark."

In *Harrington v. Libby*, 14 Blatchf. (U. S.) 128; 12 Pat. Off. Gaz. 188, *Johnson, J.*, said: "The plaintiff claims to be entitled to the exclusive use of a tin

pail with a bail or handle to it. . . . It appears that the ornamented tin pail which the plaintiff employs is a common article in commerce, and that pails made of tin, ornamented, or unornamented, are and have long been in use for all such purposes as anyone may choose to apply them to. . . . The forms and materials of packages to contain articles of merchandise, if such claims should be allowed, would be rapidly taken up and appropriated by dealers, until some one, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property. It will be observed, that it is not a mark at all which is claimed, but the whole enveloping package, the whole surface of which is covered by the ornamental pattern." See *McLean v. Fleming*, 96 U. S. 245.

In *Frese v. Bachof*, 13 Blatchf. (U. S.) 234; 13 Pat. Off. Gaz. 635, Johnson, J., said: "I am by no means clear, that as the case stands, the plaintiffs have made out any appropriation to their own exclusive use of the colored wrappers and form of packages employed. On the contrary, in these particulars, I am inclined, upon the proofs, to the conclusion that both plaintiffs and defendants have employed the common method used in *Germany* for putting up medicinal teas. Nor do I find, nor have I been referred to, any case, in which, on such resemblances alone, apart from names or labels containing imitative matter, it has been held that an injunction would lie."

In *Re Kane*, 9 Pat. Off. Gaz. 105, Duell, Commissioner, said: "Galvanized iron hoops for barrels have so long been used that their use on whisky barrels can hardly be regarded at this time as an original appropriation by petitioners. But if now first adopted for liquor barrels, it is not sufficiently distinguishable from the same mark on similar barrels to either protect the applicant in the sale of his goods, or to afford notice to the public of original ownership."

In *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 392, Morell, J., said: "The package, case, or vessel in which the commodity is put, if prepared in a peculiar or novel manner, although in itself perhaps not a trade-mark, may very properly be a very important part of it; and where a peculiar

device is applied to a box or barrel which has been especially prepared to receive and give prominence to the design, such especially prepared box or barrel constitutes a part of the trade-mark, and may participate in the protection which will be given to the trade-mark itself."

In *Moorman v. Hoge*, 2 Sawyer (U. S.) 78; 4 Am. L. T. 217, Sawyer, J., said: "I find no case where the vessel, box, package, or whatever contained the article, has been held to constitute a trade-mark by reason of its peculiar form or dimensions, independent of any symbols, figure, or device impressed upon, or connected with it for a trade-mark. I find no case where the use of a package of peculiar form and dimensions has been restrained without having imprinted upon or connected with it, some other symbol, word, letter, or form, adopted as a trade-mark. . . . After a careful examination of the question, my conclusion is, that the barrel in question, without any other marks, or symbols, is not, and that it cannot become, a lawful trade-mark, or a substantive or integral part of a lawful trade-mark, and that complainants have no exclusive right to its use as such."

In *Ellis v. Zeilin*, 42 Ga. 91, Lochrane, C. J., said: "In matters of medical agents whose effects are upon the human system, any man has a right to compound his liver medicine, or other medicine, and publish all the diseases within its range of cure, no matter how many predecessors or precedents he may have had, and to put it in such bottles or packages as he pleases, so long as he does not set up the right to another man's property or advertise for sale another man's wares, and does not use his invention, with its prints, packages and symbols as his own. As soon as he does this, he is liable in law and will be restrained. We recognize the property in trade-marks or business, but do not recognize that every person is restrained from putting his own in two-ounce bottles or four-ounce packages, and printing the diseases it will cure, because somebody else has done so."

In *Woollam v. Ratcliff*, 1 H. & M. 259, Wood, V. C., said: "In this case the plaintiff has a peculiar mode of making up his goods. This is not precisely a trade-mark." Later he said: "There is the express direction to the defendant to imitate the plaintiff's

4. **Articles Attached to Manufactured Products.**—An article attached to a manufactured product may be a valid trade-mark, the same as any other sign or symbol, provided it complies with the definitions relative to those subjects. The *United States* trade-mark registration law requires that a trade-mark, to be registered and protected, shall be affixed to the article itself.¹

bundle. This is, of course, always an element of suspicion; but I cannot treat it as conclusive."

In *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324, Wheeler, J., said: "The plaintiffs have no monopoly of six-cord thread, or of the sale of it in lengths of two hundred yards on spools. All others have a right to manufacture it, put it up in that form, describe it, and dispose of it." *Affirmed* 149 U. S. 562.

In *Davis v. Davis*, 27 Fed. Rep. 490, Carpenter, J., said: "A trade-mark is some arbitrary or representative device attached to, or sold with merchandise, and serving to designate the origin or manufacture of that merchandise. I do not think that the merchandise itself, or any method of arranging the various packages, can be registered as a trade-mark. In the very nature of the case, as it seems to me, the trade-mark must be something other than, and separate from, the merchandise."

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Argument to show that the name of the pills, as given in the trade-mark of the respondent, was of a character to mislead and deceive, is scarcely necessary, as they are *idem sonans* in the usual pronunciation; nor can it be doubted that the form of the box containing the pills and the general appearance of the wrapper which surrounded it were calculated to have the same effect."

1. In *Ex p. Stratton*, 18 Pat. Off. Gaz. 923; 60 P. & S., Marble, Commissioner, said: "Applicants in this case seek to register as a trade-mark for cigars, 'A waved band of ribbon of rectilinear form, longer than it is wide, which is fastened to the two ends of a cigar box, and so placed with reference to the cigars within the box as to be below some of said cigars, and above the remaining cigars.' . . . It is not pretended that the device employed by applicant in this case has any mechanical function whatever, nor is it an old form of receptacle applied to a particular use. Indeed, no references whatever are given to show that strips or ribbons

have been attached to boxes of any description in a manner resembling this.

. . . An inspection of the illustration at such a distance that the printed matter contained on the band cannot be read, shows at a glance that applicants have attached to their wares a device by which they can be readily distinguished from the wares of another. This is the purpose of a trade-mark, and this purpose applicants have in my judgment accomplished."

In *R. Gordon*, 12 Pat. Off. Gaz. 517, Doolittle, Acting Commissioner, said: "The trade-mark sought to be registered, is described as a narrow strip of leaf tobacco placed as a wrapper around the mouthpiece or end of a cigarette, and which varies with the size of the cigarette. . . . I regard it as no objection to the mark now sought to be registered that it is connected so intimately with the article to which it is attached, as to necessitate its consumption with that of the article itself. But does it perform the sole office of a trade-mark? . . . I am constrained to agree with the examiner that the leaf of tobacco wrapped around the mouthpiece or end of the cigarette answers a practical and perhaps a very useful purpose. Being composed of tobacco, it is an addition to the material of the cigarette, strengthens the wrapper, and is probably more agreeable to the taste than the paper of a cigarette, etc. The useful properties of the article, therefore, seem to be the predominant ones, while the function which the wrapper performs as a trade-mark is merely incidental. If applicant has introduced an improvement in the manufacture of cigarettes, and is entitled to protection thereon, it should be by a patent; but if not protected by a patent, other manufacturers of cigarettes cannot be prevented from using the like useful device. The intent of the trade-mark law is to afford protection to symbols, and not to inventions or mechanical devices. It being a common right to use any mechanical device which is deemed useful, the use of which is not restricted

5. **Name of Patented Article After Expiration of Patent.**—When a new thing is created, such as an invention, and is patented under the patent law, and goes into use to such an extent as to be given a name, either by the inventor or the public, that name is the property of the patentee during the life of the patent. But the patent law is based upon a principle which grants a monopoly of an invention to a patentee for a limited period, on condition that the inventor will disclose the whole invention, and after the expiration of the patent the public shall have the free and unrestricted use of the invention. To permit any extension of the monopoly, by protecting the name of the patented article as a trade-mark after the expiration of the patent, would be a violation of this principle, and hence it is that the courts of the *United States* have uniformly held that where the public have acquired the right, by the expiration of the patent, to use the invention, they are equally entitled to use all names, forms, packages, labels or other indicia which have been used by the inventor during the lifetime of the patent, to indicate the identity of the patented article. This applies to the inventor's name, it being held that if the inventor himself continues to manufacture the article after the expiration of the patent, and desires to protect his own personal reputation, he must adopt a new and arbitrary trade-mark and build up his right of ownership therein exactly as if he were a stranger.¹ And this rule applies equally to copy-

by a patent, it would seriously embarrass trade if, in the present instance, the exclusive right should be given to applicant to use his device as a trade-mark."

The plaintiffs claimed an injunction to restrain defendant from selling any champagne in bottles with corks bearing plaintiffs' brand, or only colorably differing from it, etc. Fry, J., comments on the fact that the brand could not be seen until the cork was drawn, but on evidence that it was the common custom of the trade to place the brand on the inside of the corks, he granted the injunction. *Moët v. Pickering*, 6 Ch. Div. 770.

The plaintiffs, since 1855, had rolled their carpets upon a hollow stick, which stick, when put into the center of their rolls of carpet, they claimed to be their trade-mark. The stick consisted of two pieces, ground on the inside, so that when the two pieces were put together, they formed a shell with a rectangular opening, and with the corners of the outside rounded off so that the ends of the stick or shell formed an octagonal ring. This ring was both visible and tangible in each end of each roll of carpet. It was held, "that said

stick, as claimed by plaintiffs, was a good and valid trade-mark; that they were entitled to its exclusive use." *Lowell Mfg. Co. v. Larned*, Codd. Dig. of Trade-marks, § 986.

1. *Wilcox, etc., Sewing Mach. Co. v. Kruse, etc., Mfg. Co.* (N. Y. 1890), 23 N. E. Rep. 1146, *affirming* 14 Daly (N. Y.) 116.

In *Coats v. Merrick Thread Co.*, 149 U. S. 572, *affirming* 36 Fed. Rep. 324, Brown, J., said: "However this may be, plaintiffs' right to the use of the embossed periphery expired with their patent, and the public had the same right to make use of it as if it never had been patented. Without deciding whether, if the embossed periphery had contained a word which was capable of being appropriated as a trade-mark, defendants could have appropriated the same upon the expiration of their patent, it is clear that no such monopoly could be claimed of mere numerals, used descriptively, and therefore not capable of exclusive appropriation because they represent the number of the thread, and are, therefore, of value as information to the public. . . . The patent being, not simply for the embossed number, but

for embossing the same upon the periphery of the spool head, defendants were entitled, upon the expiration of such patent, to use them for a like purpose." See also the observations of Wheeler, J., in the lower court (36 Fed. Rep. 324).

In *Singer Mfg. Co. v. June Mfg. Co.*, 51 Pat. Off. Gaz. 1945, Blodgett, J., said: "The rule deducible from these adjudged cases seems clearly to be this: that if the manufacturer of a patented machine adopts a peculiar style or form, in which to embody the working mechanism covered by his patents, or any special mode of ornamentation to make the machine attractive and salable, such form of construction and ornamentation, although not strictly essential to the operation of the mechanical device covered by the patents, still becomes a part of the machine, as presented to the world on the expiration of the patents. It goes to the public in the dress and with the features which have been given it by its manufacturer under the patents. It is presumable that an intelligent manufacturer, wishing to secure a large sale for a mechanical device, of which he has a monopoly, especially in a machine of the kind under consideration, which has become a part of household furniture, used his best skill and taste as a constructor, to make the machine convenient and attractive, so as to give the best possible embodiment of his patented mechanical devices, and, as I have already said, this dress thus given to the machine becomes a part of it, and the public, when they have the right to use the patent, have the right to use the dress in which the patentee clothed it; hence any sewing-machine manufactured by another person, after the expiration of the patents upon the principles covered by the Singer patents, may be a perfect imitation of the machines which the complainant or its predecessors manufactured under their patents. It is the misfortune, perhaps, in a certain sense, of the complainant, if it continues to manufacture Singer sewing machines of the style originated by it, that others may also manufacture machines which look as well and operate so nearly like those of complainant as that it may take a person of experience to tell the difference between them, aside from the name or trade-mark of the manufacturer thereon; but the fact that this right of others may embarrass the complainant's

business, is only a consequence following the right of the public to make and use, without tribute to the patentee, machines which have in their mechanical principles and forms of construction become public property. It would be a dangerous doctrine to concede that a patentee who has invented a machine which has gone into extensive public use can, after the patents have become public property, still prevent the public from having the benefit of the invention, until they devise and adopt some new form of construction from that adopted by the manufacturers under the patents, and create a new reputation for their machine. I am, therefore, clear that the claim set up by complainant to the exclusive use of the word 'Singer' as a trade name, and to the exclusive right to the mode of construction, external shape, appearance, and ornamentation adopted by the complainant while the patents were in force for its 'New Family Singer' and 'Medium Singer,' is not well founded, and should not be so held, as a matter of law, upon the proofs in this case."

In *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34, Wallace, J., said: "It is also held that the complainants have no exclusive right to use the words 'Weymouth's Patent' as a trade-mark, because they are the name which was given to such hay-knives when they were first made and sold, and the name by which they have become recognized and dealt in by the public; and that after the patent expired all persons had the right to deal in the article by that name, and also to print the name upon the article. These conclusions are but the application of familiar law to the facts of the case, and it would be quite superfluous to indulge in any extended discussion of the authorities."

In *Gally v. Colt's Patent Fire-Arms Mfg. Co.*, 30 Fed. Rep. 118, Shipman, J., said: "The first question in this part of the case is whether the defendant corporation is to be enjoined against selling, in the market generally, Universal Presses, which contain only the devices described in the expired patents. I see nothing . . . which forbids the Colt's Company from selling, or which implies that it is not to sell to any person, the 'Universal Press' after the patents therein have expired. . . . The name 'Universal' or 'Universal Printing Press,' was adopted, at the time the

patents were issued, to designate the patented press. It was not a trade-mark of the plaintiff, which became identified with his workmanship, and indicated that the press was of his manufacture, but was a name which characterized the press which he invented. Any manufacturer, who uses the name now, does so to show that he manufactures the Gally press, which he may rightfully do, and does not represent to the public that it is getting any skill or excellence of workmanship which Gally possessed, and does not induce it to believe that the presses are manufactured by the plaintiff. *Filley v. Child*, 16 Blatchf. (U. S.) 376; *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436."

In *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127; 52 Am. Rep. 74, *Dickman, J.*, said: "Descriptive as the name *Singer* is of machines of a really distinctive character in their construction and principle of operation, when the patents protecting them expired, the right to use that name accompanied the right to make and sell the machines. It would be a poor return for the exclusive privilege which the public gives for a long period to the patentee, if, after the expiration of his patent, he shall be allowed to virtually perpetuate his monopoly, in a measure, by preventing all others from using the name, which will describe and make known the invention that has become dedicated to the public. It is sought by blending the name *Singer* with the trade-mark, to perpetuate an exclusive property in the name after the life of the *Singer* patents. But a patentee or his assignee, by incorporating into his trade-mark the distinctive name by which a patented machine has become known to the public during the existence of the patent, cannot, after the expiration of the patent, take away from the public the right of using such name. The trade-mark cannot be made a guise for extending the monopoly, or preventing the name from becoming, with the patent, the property of the public. *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706. Where machines, during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification, in machines of the same kind manufactured and sold by them."

In *Wilcox, etc., Sew. Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; 126 P. & S., *Wheeler, J.*, said: "Accordingly, a manufacturer of a patented article, after the expiration of the patent, has a right to represent that it was made according to the patent, and to use the name of the patentee for that purpose. *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Singer Mfg. Co. v. Loog*, 48 L. T. 3; 15 Rep. 538. Anything descriptive of the properties, style, or quality of the article merely, is open to all. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51. While no one has the right to sell his own wares as the wares of another, every one has the right to make and sell any wares not protected by patents. Marks, symbols, or dress placed upon the wares might unlawfully misrepresent their source, but when left to speak for themselves alone, there could be no wrongful misrepresentation. These principles are not much controverted by the orator's counsel, but it is claimed that, as the orator's machines are somewhat known by this frame, and other shapes easily distinguishable from this might be equally useful, some of which in hexagonal or octagonal, instead of circular, shape are suggested, the defendant should use some of those. But those, doubtless, would have been infringements of the patents, and the style used is as much freed by the expiration of the patents as those are. All the effect which these frames have in representing machines to be those of the orator, appears to be due to the monopoly enjoyed under the patents; and to give the orator the benefit of the effect by calling the frame a trade-mark, would continue the monopoly indefinitely, when under the law it should cease. It is obvious that the registration of the trade-mark in 1880, would not affect rights which the public already had acquired; it is not claimed that it should."

In *Filley v. Child*, 16 Blatchf. (U. S.) 376; 23 P. & S., *Blatchford, J.*, said: "As the patent has expired, and the defendant has a right to sell cooking stoves embodying the patented improvements, the sole question is, whether the defendant has a right to sell them with the name 'Charter Oak' upon them. . . . Under such cir-

rights.¹ This doctrine has been held to apply to cases where the trade-marks were applied to unpatentable articles, the patents upon which were held to be void by the courts. It would seem that if the patent was invalid it never existed, and hence should not operate to defeat trade-mark rights. But the rule is otherwise, upon the ground that the supposed inventor, having selected his remedy or means of protection by patent, must abide by the

cumstances, the plaintiff cannot, after his patent has expired, and when M. L. Filley has the right to make stoves containing said improvements, prevent him from calling them by the name of 'Charter Oak,' so long as he does not represent them as being made by the plaintiff, or induce others to believe that they are made by the plaintiff."

In *Singer Mfg. Co. v. Larsen*, 8 Biss. (U. S.) 151; 13 P. & S., Drummond, J., said: "If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine." See also *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208.

In *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; 5 P. & S., Johnson, J., said: "Certainly, if the words, 'Fairbanks' patent' do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is, to pretend that a scale is made by one person, which is, in fact, made by another." See also *Frost v. Rindskopf*, 42 Fed. Rep. 408.

The patentee of an alleged invention, in consideration of the exclusive privilege granted to him for a limited period, is bound to disclose fully his secret; and is understood as dedicating the supposed invention to the public, subject to the supposed exclusive privilege. If the privilege is invalid, the dedication is immediate and absolute. It has, therefore, been contended that the rights of the public ought to be protected against any subsequent assertions by the patentee of an independent right under the name of a trade-mark. *Consolidated Fruit Jar Co. v. Dordfinger*, 6 Am. L. T. N. S. 511.

1. *Clemens v. Belford*, 14 Fed. Rep. 728; 114 P. & S.; *Cox's Man. of Trade-Mark Cases* 685.

In *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411, Thayer, J., said: "I have no doubt that defendant is entitled to use the words 'Webster's Dictionary' to describe the work that it is engaged in publishing and selling. Those words were used to describe Webster's Dictionary of the edition of 1847, and, as the copyright on that edition has expired, it has now become public property. Any one may reprint that edition of the work, and entitle the reprint 'Webster's Dictionary.' The latter words which appeared on the title-page and on the outer cover of books of the edition of 1847, have become public property, as well as other parts of the work." Followed in *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. Rep. 944.

In *Merriam v. Holloway Pub. Co.*, 43 Fed. Rep. 450, Miller, J., said: "When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. . . . The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book. . . . The contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired." See also *England v. New York Pub. Co.*, 8 Daly (N. Y.) 375; 14 P. & S.; *Clement v. Such* (N. Y. Super. Ct.), Codd. Dig. 312; *Cox's Man. of Trade-Mark Cases* (1st ed.) 429.

In *Osgood v. Allen*, 1 Holmes (U. S.) 185, Shepley, J., said: "The right secured by the act, however, is the property in the literary composition, . . . not in the name or title given to it. . . . No case can be found,

consequences of his own acts, and cannot be permitted to hold as trade-mark what he had lost as patent.¹

These rules, however, are subject to this exception: where a valid trade-mark is adopted and used by a manufacturer to designate his goods, and subsequently patents are obtained, either on the whole or part of the article to which the mark is applied, the expiration of such subsequently acquired patents will not affect the validity of the trade-mark.²

either in *England* or this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate." See also *Archbold v. Sweet*, 1 M. & Rob. 162; *Byron v. Johnston*, 2 Meriv. 29.

1. In *Lorillard v. Pride*, 36 Pat. Off. Gaz. 1150, Blodgett, J., said: "It also appears that the complainants' first effort was to secure to themselves the exclusive right of tin as a badge of their goods, by means of the Siedler patent, and that their goods acquired the name of 'Tin-Tag' goods while they were acting under their patent, and that it was not until after their patent had been held void that they fell back upon their right to use tin as a trade-mark. Having adopted this use of tin and given to their goods the name of 'Tin-Tag Tobacco' while they were claiming the rights given them by the patent, it seems to me they have no right now to perpetuate a monopoly which the courts decided they could not have, by falling back upon the popular name given their goods marked in pursuance of the patent. If their goods properly became known and designated in the market as 'Tin-Tag' goods, by virtue of their marking them or tagging them in pursuance of their patent, the right to so indicate or mark the goods became public when the patent expired or was declared void, and they cannot perpetuate or continue this right by claiming it as a trade-mark."

In *Selchow v. Baker*, 93 N. Y. 66; 45 Am. Rep. 169, Rapallo, J., said: "When the patent expires, or in foreign countries where the patent has no force, there is no piracy in making or selling the article under the name by which it has become generally known. This name has become the proper description of the article, as indicating that it is made according to the patented invention, and is not the trade-mark of any particular manufacturer. The patentee relies for his protection

upon his patent, and cannot, by calling the name of his patent a trade-mark, protect his monopoly after the patent has expired, or where it has no force. Such are the cases of *Wheeler*, etc., *Mfg. Co. v. Shakespear*, 39 L. J. N. S. 36; *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15."

In *Sawyer v. Kellogg*, 7 Fed. Rep. 720; 81 P. & S., Bradley, J., said: "The complainant's label, which he alleges that the defendant has wrongfully imitated, had been in use substantially in the same form for a dozen or more years prior to the bringing of the suit. . . . It is further suggested that the complainant has lain by for several years, whilst the defendant has been publicly using his own label, and has thus acquiesced in its use. To this suggestion it may be proper to reply that the complainant had a patent for the article of bluing, which he was prosecuting and endeavoring to substantiate, but in which he finally failed. His failure to establish his patent (which would have covered all his rights), ought not to preclude him from falling back on his right to the trade-mark. No essential delay has occurred since the termination of the proceedings on the patent. But, at any rate, an acquiescence in Kellogg's use of his own label was no acquiescence in his use of the new and altered label having Sawin's name in the caption. We think the case is with the complainant, and that a decree should be made in his favor. Let a decree be made accordingly."

2. In *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679; 35 P. & S., Paine, Commissioner, said: "But now the applicants assert that by assignment they have become the owners, not only of certain patents with which this trade-mark has been associated, but also of the trade-mark itself, and that it has been used by their assignors seventeen years; that it was used as a common-law trade-mark nearly eight years before 1870. This was a valid trade-mark

The English rule differs somewhat from the American. The general proposition is announced,¹ but very strict proof is required to show that the name of the patented article has become purely generic and no longer indicates the origin and ownership

at common law, subject, of course, to rights of other persons of the same name, whatever they might be. The fact that the owners of the trade-mark also owned certain patents with which it was connected, did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole, and not merely certain parts of it, have terminated the existence of the trade-mark which had been used during the life of the patent. If the applicants are the legal assignees of the patents and of the trade-mark, they are protected by the statutory provision which preserves the right to register common-law trade-marks which were in use before 1870. If the applicants shall so amend their application as to show in their oath that they are the assignees of this trade-mark; that it has been used by their assignors for seventeen years; and that they are also the lawful assignees of the patents relating to parts of this fruit-jar, under which the jar bearing the trade-mark in question has been sold, they will be entitled to registration."

In *Re Consolidated Fruit Jar Co.*, 14 Pat. Off. Gaz. 269, Doolittle, Acting Commissioner, said: "Applicants adopt the name 'Mason' as the essential mark. . . . If there were an accompanying mark, that should be the one recorded and known as the particular trade-mark of applicants. It is a universal custom to refer to patented articles by the name of the inventor, as the Howe sewing machine, the Bell telephone, etc.; and such names soon become generic in their character, designating a particular kind or class of articles. So it is in the present case. During twelve years preceding the year 1870, the particular form of fruit jar made by applicants had become widely known as 'Mason's Fruit Jar,' and it no doubt will continue to be so known as long as the demand for it exists. It is also clear that applicants were enabled to stamp on their goods the label 'Mason's Fruit Jar,' and to protect themselves in the exclusive manufacture and sale of the article by virtue of the patents owned by them. If ownership or right to manufacture

under the patents had been vested in others, there can be no doubt that they too would have been entitled to use this stamp. When all such rights cease by the expiration of the patents, the public will succeed thereto, and no one can be prevented from manufacturing and selling Mason's fruit jars, and stamping them as such." *Tucker Mfg. Co. v. Boyington*, 9 Pat. Off. Gaz. 455.

1. In *Re Ralph's Trade-Mark*, 25 Ch. Div. 194, Pearson, J., said: "The trade-mark, as I have already stated, is 'The Home-Washer,' and it is said that, 'The Home-Washer,' no doubt, during the existence of the patent described the machine and was understood in the trade to describe the machine which was made under the patent; but that, if Mr. Ralph is to continue that as his trade-mark after the patent has expired, it really gives him, under the Trade-Marks Act, an addition to the period which is given him under the patent. That point was taken and considered by my predecessor, the present Lord Justice Fry, in the *Linoleum Case*, 7 Ch. Div. 834. Lord Justice Fry there came to the conclusion that it was impossible for this court so to construe the Trade-marks Act as to do away with what has been the law of the land from the time of King James downwards, namely, that the patent comes to an end at the expiration of a period of fourteen years, unless it is renewed and a further grant given, as is done in some cases."

In *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, Lord Selborne, L. C., said: "I am satisfied that the phrase, 'Singer System,' whether scientific or not, whether exact or loose, is used by the defendant, and by other persons in the same trade, to signify, not a figment, but a fact. . . . There are, in fact, a good many different kinds of sewing machines, well known in the trade, which have come to be described by appellations derived from the names of their original inventors, patentees, or manufacturers; of which appellations 'Wheeler-Wilson' is one . . . and that company, like the plaintiffs in the present case, sought to restrain the use of the name 'Wheeler-Wilson' by

other manufacturers. It was decided, however . . . *Wheeler, etc., Mfg. Co. v. Shakespeare*, 39 L. J. Ch. N. S. 36; *Condy v. Mitchell*, 37 L. T. N. S. 766, that this name 'Wheeler-Wilson' had come to signify in the trade, not the particular manufactures of Messrs. Wheeler & Wilson, or of the Wheeler-Wilson Company, but the kind or kinds of machines which they made, the manufacture of which was *publici juris*. The injunction, therefore, asked in that case was refused."

In *Linoleum Mfg. Co. v. Nairn*, 7 Ch. Div. 834, Fry, J., said: "Plaintiffs have alleged, and Mr. Walton has sworn, that, having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of 'Linoleum,' and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if 'Linoleum' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone, after his competitors are at liberty to make the same article. . . . The word 'Linoleum' did bear that meaning which Mr. Walton put upon it, namely, solidified or oxidized oil; that solidified or oxidized oil may be made by the defendants if they are minded to make it; and if they are minded to call it by the only name which it bears, I think they are at liberty so to do. If I found they were attempting to use that name in connection with other parts of a trade-mark, so as to make it appear that the oxidized oil made by the defendants was made by the plaintiffs, of course the case would be entirely different."

See also *In re Horsburgh*, 53 L. J. Ch. 237.

In *Cheavin v. Walker*, 5 Ch. Div. 850, Jessel, M. R., said: "No doubt a man may use the word 'patent' so as to deceive no one. It may be used so as to mean that which was a patent, but is not so now. In other words, you may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. . . . Protection only extends to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark. . . . The defendant's label is as follows: 'S. Cheavin's Patent Prize Medal Self-Cleaning Rapid Water Filter, Improved and Manufactured by Walker, Brightman & Co., Boston, England.' That is to say, that the filter is manufactured according to Cheavin's expired patent by Walker, Brightman & Co. . . . this court ought not to interfere."

In *Wheeler, etc., Mfg. Co. v. Shakespeare*, 39 L. J. N. S. Ch. 36, James, V. C., said: "I could not restrain the defendant from using the words 'Wheeler & Wilson,' as descriptive of any sewing machine other than the sewing machine manufactured by the plaintiffs. It appeared to me that 'Wheeler & Wilson' was really not the name of the company, either abbreviated or otherwise, but the name of the thing in particular; as the plaintiff's bill represents it, it is called 'The Wheeler & Wilson Sewing Machine,' and there being no other designation for this particular machine, one can easily understand that that was the name of the patentee or the person who at one time had the patent. . . . It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of that patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying, 'I have got a trade-mark in the name of a thing which was the subject of the patent,' and therefore to

of the goods in the patentee or owner of the patent.¹ It has also been held in *England* that where the patented article has one name, the patentee may adopt another name or arbitrary trade-mark and acquire rights in it which will outlive the patent;²

that extent I think the plaintiffs are not entitled to the relief they ask."

In *Edelsten v. Vick*, 11 Hare 78, Wood, V. C., said: "There is no property in a mere name; it may be open to the use of all persons dealing in the article which it describes. Thus, a maker of pins may say, 'I, John Smith, manufacture and sell Tayler's Solid Headed Pins,' and the court would not in such a case grant an injunction to restrain the use of that name." See also *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 448.

1. In *Singer Mfg. Co. v. Spence*, High Court of Justice, Ch. Div. Eng.; Trade-Mark Record, Aug. 16th, 1893, defendants had been selling sewing machines under the names of "Improved Singer," "Improved Singer Sewing Machine," "Frister & Rossmann's Improved Singers," and "Frister & Rossmann's Improved Singer Sewing Machines." Defendants stated that in all the above, manufactured and sold by the German Company, the names of the makers, Frister & Rossmann (supposed to be the real defendants), were stamped in clear and legible type, and that the same care was taken with all the price lists, catalogues, etc. The judgment rendered was, that plaintiff's trade-mark is "Singer," and "Singer" or "Singer's" their trade name. Dealers may make and sell their own goods as of "the Singer system," or "the Singer principle," but can use the word "Singer" only in such a way as to prevent any possibility of a mistake. In the present case this had not been done, nor was absence of fraud clear. An injunction was ordered, to restrain defendants from such farther advertising on cards, posters, etc., and from using the word "Singer" in connection with sewing machines not of plaintiffs' manufacture, in any way calculated to induce the belief that such machines are of plaintiff's manufacture. The costs were to be paid by defendants.

In *Singer Machine Manufacturers v. Wilson*, L. R., 3 App. Cas. 376, the Lord Chancellor (Lord Cairns) said: "It is perfectly clear that the defense set up in this answer, and the issue tendered by the defendant, is that the

term 'Singer,' as applied to a sewing machine; has, in the language of the country and the nomenclature of the trade, come to describe a machine or two machines of a particular structure and formation, without any reference to the manufacture, or to the quality of manufacture, just as the terms 'Brougham' and 'a Hansom' cab have come to mean carriages of a particular shape, by whomsoever made; and the object of the defendant has been to bring the case within the authority of some well-known cases decided in the court of chancery, in which it has been held—but always upon the evidence in each case—that a proper name applied to a patented or other article, may come to be the name of the article, and not a mark or sign indicating the manufacturer. . . . Some attempt was, indeed, made by the respondent to show, in some of the advertisements of the plaintiffs, and in some of the specifications of patents taken out by or for them, the use of the term 'Singer machine' or 'Singer system,' in a wider sense; but I cannot look upon any of the expressions so used by the plaintiffs, whilst speaking of their own machines, as doing away to any serious extent with the effect of the evidence to which I have referred. If, therefore, I were obliged to decide this case upon the issue thus raised, and as it seems to me properly raised, by the pleadings, and upon the whole of the evidence now before your lordships upon that issue, I should certainly feel it impossible to say that the respondent had established the issue upon which he had placed his case." See also *Condy v. Mitchell*, 37 L. T. N. S. 766.

2. In *Re Palmer's Trade-Mark*, 24 Ch. Div. 504, Chitty, J., said: "The applicants allege that the term 'braided fixed stars' was used to describe the articles manufactured under this patent, and that Palmer & Son could not have any trade-mark in that term. Now, I consider it plain that a man can have a patent for a new manufacture, and at the same time a trade-mark in the name used to designate the goods, though they are made under the patent." In an additional opinion rendered in the same case, Lindley, L. J., said:

but in this country there is, as yet, no settled rule upon this point.¹

6. Words and Marks in Prior Use.—The acquisition of title to a trade-mark, may be compared to the taking possession of a thing in a state of nature; title can be acquired only when the mark has not been used previously by any one as a trade-mark for the same class of merchandise,² or, unless it has been abandoned

"It appears to me that that is what is contemplated, and it is what ought not to be allowed. I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article, so as to be entitled to the exclusive use of that mark after the patent has expired; for instance, if he impressed on the patented article a griffin, or some other device; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out, as a matter of fact, that this mark denotes him as the maker, as distinguished from other makers. At all events, the respondents have not made it out here, and it appears to me, therefore, that this is a mark which is not authorized to be registered under the act."

1. In *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; 75 P. & S., Treat, J., said: "A review of the many cases cited leads to the following conclusions: *First*: That when a patented article is known in the market by any specific designation, whether of the name of the patentee or otherwise, every person, at the expiration of the patent, has a right to manufacture and vend the same under the designation thereof by which it was known to the public. *Second*: That the original patentee or his assignees have no right to the exclusive use of said designation as a trade-mark. Their rights were under the patent, and expired with it. *Third*: If a corporation or person wished to establish a trade-mark or name, indicative of its own special manufacture of such a machine or product, the right must grow up, just as all other rights of the kind are established—by use of an acquiescence. Thus, as every one at the expiration of the patent had a clear right to manufacture and vend what was known as the 'Singer' sewing machine the plaintiff could acquire no exclusive right to the name 'Singer,' but could by proper trade-mark appropriate to itself names

or devices indicating its own manufacture of such machines" after the expiration of the patent.

In *Singer Mfg. Co. v. June Mfg. Co.*, 51 Pat. Off. Gaz. 1948, Blodgett, J., said: "The claim is that complainant originated this trade-mark and began the use of it early in 1871, which, according to the proof, was while many of the patents owned by complainant and its predecessors remained in force; and, while I do not deem it necessary to pass upon the question here, I have serious doubts whether a manufacturer making a machine under a patent or patents can, while doing so, apply a trade-mark which shall continue his exclusive property after the expiration of the patents which gave character to the mechanism; but I feel very sure that if in so applying a trade-mark, the plate or escutcheon on which it is impressed or engraved became a part of the ornamentation of the machine, the plate itself may be used by others as an ornament of the machine after the expiration of the patent, even if the later manufacturer has no right to use the special symbols of the trade-mark."

2. In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 53, Miller, J., said: "Every one is at liberty to affix to a product of his own manufacture, any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others."

In *Coats v. Merrick Thread Co.*, 149 U. S. 569, Brown, J., said: "If the plaintiffs had been the first and only ones to make use of this label, another person seizing upon and appropriating a black and gold label of the same size, and for the same purpose, might be held guilty of infringement, when, if the plaintiffs had no exclusive right thereto, and defendants had done only what others had done before, they would not be so considered."

In *Corbin v. Gould*, 133 U. S. 308, Lamar, J., said: "With respect to the word 'Tycoon,' the evidence shows beyond question that it has been used as

a name or brand for Japan tea for many years. Invoices of 'Tycoon Tea' were received at the custom-house in San Francisco as early as May 15th, 1873, as shown by a copy of the official records of that office filed in this case; and the evidence of dealers and merchants of *California* is all to the effect that the word was in common use as a brand for Japan tea for several years prior to that date. It is unnecessary to go into this evidence in detail; but it is conclusive as to the long use of the word prior to the alleged adoption of it as a part of the trade-mark of the complainants. The authorities cited by complainants' counsel, to show that the prior use of a word as a trade-mark, by another party who had abandoned it, is not sufficient to debar the present owner of it from protection, do not apply to this case. At the time complainants claim to have adopted the word 'Tycoon' as their trade-mark, for the particular species of tea dealt in by them, it was not an abandoned trade-mark, previously used by some other person or firm to designate a particular quality of tea; but it was, and had been for many years, in general and common use as a term descriptive of a class of teas introduced into the American market; a term which all men engaged in the tea business had an equal right to use, and which belonged to no one individual, either as a trade-mark or a trade label. It belonged to the public, as the common property of the trade, and therefore, was not subject to appropriation by any one person. . . . *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 324. See also *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *Liggett, etc., Tobacco Co. v. Finzer*, 128 U. S. 182; *Stachelberg v. Ponce*, 128 U. S. 686; *Menendez v. Holt*, 128 U. S. 514. Even conceding that the complainants may claim a trade-mark for the combination of the diamond and the words inclosed in it, as described in their application to the Patent Office, there was, upon the authorities above cited, clearly no trade-mark in the word 'Tycoon,' considered by itself."

In *Liggett, etc., Tobacco Co. v. Finzer*, 128 U. S. 182, Field, J., for the court, said: "The Liggett and Myers Tobacco Company, a corporation created under the laws of *Missouri*, manufactured plug tobacco at St. Louis in

that state. This tobacco is put up for sale marked with a star made of tin, having five points and a round hole in the center, and attached to the plug by prongs at its back. The bill alleges that the complainant has for many years been extensively engaged in manufacturing this plug tobacco, and in selling the same in large quantities in St. Louis, Louisville, and throughout the *United States*, and that every plug has been marked with such a star. . . . That the complainant was the original manufacturer of this tobacco with the design of a star affixed to the plugs; and that the defendant, knowing all this, is manufacturing and selling, at Louisville, *Kentucky*, plug tobacco to which is affixed a round piece of gilded paper having on it a red star, under which the word 'Light' is printed. . . . Upon the first of these two points, the testimony establishes the fact that the complainant was the first person to use a star made of tin and fastened upon plug tobacco, as described above; but that he was not the first person to use the design of a star upon plug tobacco. The priority of use, therefore, by the complainant extended only to the tin star, and not to the design of a star generally." For this reason the rights of the plaintiff were held by the court to be limited to the tin star, and this the defendant did not infringe.

In *Stachelberg v. Ponce*, 128 U. S. 686, Harlan, J., said: "If it was satisfactorily shown that those words were not used in the trade to designate a particular kind of cigars, until after the words 'La Normandi' or 'Normandi' had become a part of the established trade-mark of Bijur, it might be necessary to consider whether the former words, taken in connection with the entire label or brand used by the defendant, his mode of packing his cigars, and their size and appearance, were calculated to deceive the public by inducing the belief that they were the same cigars as La Normandi cigars, manufactured and sold by Bijur, and by the plaintiffs. But no such case is made by the proof. . . . An effort is made to discredit the evidence establishing these facts, by showing by witnesses, engaged for many years in the business of manufacturing and selling cigars, that they never knew or heard of any being sold under the name of 'La Normandi.' But the evidence to that effect is entirely negative in its

character, and is not sufficient to overcome the direct, positive testimony of witnesses, some of whom, as early as 1853, actually manufactured and sold 'La Normanda' cigars of the kind above described, while others remember that domestic cigars, under that designation, were in the market before Bijur commenced the manufacture of the 'La Normandi' cigars. In this view of the evidence the plaintiffs are not entitled to the relief asked. The adoption by Bijur of the words 'La Normandi,' as part of his trade-mark, could not take away the right previously acquired by the public in the use of the words 'La Normanda,' as indicating a particular kind of cigars."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., *dissenting*, said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device not in actual use to designate articles of the same kind or class. Devices of the kind, in order that they may be entitled to protection in a court of equity, must have the essential qualities of a lawful trade mark; but if they have, the owner becomes entitled to its exclusive use within the limits prescribed by law, the rule being that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agents. Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use; nor does the right to protection extend beyond the actual use of the device. Hence, the use of it on one particular article of manufacture or merchandise, will not prevent another from using it on another and different class of articles, the rule being strictly applied that the right to protection in equity is limited to the prior use of the symbol by the owner." See also *Partidge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281.

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Words or devices, or even a name in certain cases, may be adopted as trade-marks which are not the original invention of the party who appropriates the same to that use; and courts of equity will protect the proprietor against any fraudulent use or imitation of the device by other dealers or manufacturers. Property in the use of a trade-mark, however, bears very

little analogy to that which exists in copyrights or in patents for new inventions or discoveries, as they are not required to be new, and may not involve the least invention or skill in their discovery or application. Phrases, or even words in common use, may be adopted for the purpose, if, at the time of their adoption, they were not employed by another to designate the same or similar articles of production or sale. Stamps or trade-marks of the kind are employed to point out the origin, ownership, or place of manufacture or sale of the article to which they are affixed, or to give notice to the public who is the producer, or where it may be purchased. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311."

In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311, Strong, J., said: "The first and leading question presented by this case is: whether the complainants have an exclusive right to the use of the words 'Lackawanna Coal,' as a distinctive name or trade-mark for the coal mined by them and transported over their railroad and canal to market. . . . The word 'Lackawanna,' then, was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. . . . The bill alleges, however, not only that the complainants devised, adopted, and appropriated the word, as a name or trade-mark for their coal, but that it had never before been used, or applied in combination with the word 'coal,' as a name or trade-mark for any kind of coal, and it is the combination of the word 'Lackawanna' with the word 'coal' that constitutes the trade-mark, to the exclusive use of which they assert a right. . . . Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same, or like articles of production. . . . But though it is not necessary that the word adopted as a trade name should be a new creation, never before known or used, there are some limits to the right of selection. . . . We are therefore of opinion that the defendant has invaded no right to which the plaintiffs can maintain a claim. By advertising and selling coal brought from the Lackawanna Valley as Lackawanna coal, he has made no false representation, and we see no evidence that he

by the first user, prior to its adoption by the person who asserts title to it.¹

7. Geographical Terms—*a. GENERAL RULE IN THE UNITED STATES.*—It must be considered as settled in the *United States*, that no one can apply the name of a district of country to an article of commerce, and thereby acquire such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation. The nature of geographical names is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they are applied. They point only to the place of production, not to the producer, and could they be appropriated exclusively, their appropriation would result in mischievous monopolies. Many of the older cases held that a resident of a locality had rights in the

has attempted to sell his coal as and for the coal of the plaintiffs.”

1. **Abandonment.**—In *Menendez v. Holt*, 128 U. S. 514, Fuller, C. J., said: “They used the words *La Favorita*,’ to designate flour selected by them, in the exercise of their best judgment, as equal to a certain standard. . . . These views dispose of two of the defenses specifically urged on behalf of appellants, and we do not regard that of prior public use, even if it could be properly considered under the pleadings, as entitled to any greater weight. Evidence was given to the effect that from 1857 to 1860 the words ‘*La Favorita*’ were occasionally used in St. Louis by Sears & Co., then manufacturing in that city, as designating a particular flour; but the witnesses were not able to testify that any had been on sale there under that brand (unless it were that of Holt & Co.), for upwards of twenty years. The use thus proven was so casual and such little importance apparently attached to it, that it is doubtful whether Sears & Co. could at any time have successfully claimed the words as a trade-mark, and, at all events, such use was discontinued before Holt & Co. appropriated the words to identify their own flour, and there was no attempt to resume it.”

In *Symonds v. Greene*, 28 Fed. Rep. 834, Wheeler, J., said: “This is a motion for a preliminary injunction to restrain the use of the word ‘*Eureka*’ in trade, in connection with steam and hydraulic packing. There is no question but that the orator commenced using that name for packing made by him in 1875, and has continued that

use since that time, nor but that the defendants use that name in connection with that kind of packing, not of the orator’s make, in trade; nor but that a firm known as Sellers Bros. gave that name to a kind of steam-packing patented by William Beschke in 1872, . . . and used it in connection with that packing until early in 1874. . . . The use of that name by Sellers Bros. was so long ago, and so limited, that it cannot fairly be considered to now have any effect upon the indication by it of the source of goods to which it has for so many years been applied. . . . Still, if the plaintiff adopted the name on account of value which it had acquired from its use by Sellers Bros., he would not appear to have any just right to it now which a court of equity ought to protect. But Sellers Bros. terminated their contract with the patentee, apparently on account of its unprofitableness. The plaintiff did not take up that manufacture, but commenced making a different kind, and there is not enough in the case to show that he appropriated the name wrongfully when he took it. On the whole case, as it now stands, the orator appears to be entitled to the injunction asked.”

In *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217, Wallace, J., said: “The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and sell the commodity which it has been appropriated to designate as the production or article of the proprietor. It may be abandoned if the business of the proprietor is abandoned. It may

become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment, rather than of the proprietor."

In *Mouson v. Boehm*, 26 Ch. Div. 398, Chitty, J., said: "But it appears to me that Mr. Boehm has established, first, that he did acquire a trade-mark, which became his property in connection with toilet soap, and then the question arises on that whether he ever abandoned it. . . . Now, on the question of abandonment, it appears to me that intention to abandon must be shown. There are some analogous cases in law, such as the case of an easement. Mere non-user of an easement, like a right to foul a stream, for a considerable period of years, would not be sufficient to prove an intention to abandon it. But if, as in the case of *Crossley v. Lightowler*, 1 L. R., 2 Ch. 478, the person who was entitled to such an easement as fouling a stream, has not only ceased from using it for a period of twenty years, but at the same time has allowed the mill, in respect of which the right is claimed, to fall into ruins, or has pulled it down, the court would infer, from the circumstances, an intention to abandon the right which had been previously exercised. In substance, therefore, the question of abandonment is one of intention to be inferred from the facts of the particular case."

In *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436, Acheson, J., said: "The present case turns upon the determination of the question, Had Gray the right to assume the exclusive use of the name 'Taper-Sleeve Pulley Works' as a business designation? And why not? True, it did not originate with him, but this of itself is an immaterial circumstance. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322. It did, however, originate with his predecessor in business, A. B. Cook, Jr., and whatever right he may have acquired therein impliedly passed, I incline to think, to Willard, the sheriff's vendee, and from him to Gray. *Kerr Inj.* 479. But if not, Cook having abandoned the name, Gray had the right to appropriate it (*Browne, Trade-marks*, §§ 676, 677), if it could be lawfully selected as a trade name."

In *Julian v. Hoosier Drill Co.*, 78 Ind.

408, Morris, C., said: "It (the complaint) alleges that Joseph Ingels devised and adopted the word 'Hoosier' as a trade-mark in the year 1857, and that he was then engaged in the manufacture and sale of grain drills, and then, and continuously thereafter, until the 27th day of January, 1877; that he used on said drills, by him manufactured and sold, as a trade-mark and name to designate the particular drill by him made and sold, the word 'Hoosier.' That on the 27th day of February, 1877, the said Ingels transferred and assigned to the appellant all of said letters, patents, . . . and also all the right to and property in said trade-mark which he then had or owned, and the exclusive right to use said trade-mark upon grain drills, . . . that ever since she became the owner of said trade-mark, the said Hoosier Drill Company has been engaged in the manufacture and sale of grain drills, similar in appearance . . . with the trade-mark of the appellant affixed. It is insisted by the appellees that . . . assignor . . . had abandoned the business . . . from the 20th day of March, 1876, until and after the 27th day of February, 1877. Assuming that Joseph Ingels had adequately appropriated the word 'Hoosier' as a trade-mark, which, as before remarked, is hardly questioned by the appellees, that he had, as stated . . . ceased from the 20th of March, 1876, until the 27th of February, 1877, to manufacture and sell the grain drills to which he had been for years accustomed to affix the word as a trade-mark, can it be fairly and legally inferred that he had, by such temporary suspension of the business, abandoned to the public his right to and property in the trade-mark? We think not. The question of abandonment is one of intention, and the burden of establishing it lies upon the party who affirms it. . . . In view of these facts, it cannot be inferred, from less than a year's suspension of the business by Ingels, that he intended to abandon either the business or his right to said trade-mark. The suspension must be, presumptively at least, attributed to indisposition or inability, rather than to an intention to abandon valuable rights. Browne says that the question of abandonment is one of intention, and that 'A person may temporarily lay aside his mark, and resume it, without having in the meantime lost his property in the right of user: Abandonment, being in

name of the same which would entitle him to enjoin any person not residing therein from using it to his injury, and for the purpose, or with the danger, of deceiving the public. But these cases are considerably weakened by a recent decision wherein the general doctrine is laid down that before a claimant to a trade-mark can enjoin another using the same without his license, he must show that either he or others joined with him in the suit, or who could be joined with him, have an exclusive right to employ the particular trade-mark for the particular purpose, and that this state of facts can never exist in the case of a geographical term which represents such a district or place that others might with equal right establish a similar business at the same place, and designate their goods truthfully as emanating from that particular place.¹

the nature of a forfeiture, must be strictly proven.' It is incumbent upon those alleging the defense of abandonment to show that the right had been relinquished to the public by clear and unmistakable evidence. *Browne on the Law of Trade-Marks*, § 681; *Dental Vulcanite Co. v. Wetherbee*, 3 Fish. Pat. Cas. 87. We think the delay, under the circumstances, will not preclude her from this relief. She did not intend to abandon, and therefore has not abandoned, her right, as to the future, to the exclusive use of her property in the trade-mark. Inability may prevent the use of the mark, but it will not confer upon others the right to use it, or constitute an abandonment."

In *Blackwell v. Dibrell*, 14 Pat. Off. Gaz. 633, *Hughes, J.*, said: "That whatever title *Wright* had to the use of the word 'Durham' after leaving *Morris*, in or about the year 1861, was lost by non-use, his disuse continuing through a period of probably eight or nine years after he left the vicinity of Durham's; and, second, that, during this long period of disuse, the brand of 'Durham Smoking Tobacco' acquired a definite and peculiar meaning with dealer and consumers. . . . But he did abandon its use; he stood by for some eight years and allowed a peculiar commercial and local signification to attach to the word 'Durham,' as descriptive of smoking tobacco, and not until after that local and commercial signification had come to identify the tobacco labeled with the word all over the country. . . . That the right to use a trade-mark may be lost by abandonment or disuse, is too clear to need argument or the support of authority."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, *Duer, J.*, said: "He, who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use, the profits to which the superior skill and enterprise of the other had given him a prior and exclusive title. . . . The allegation that there has been such an acquiescence for some years on the part of the plaintiffs in the conduct of the defendants, as to bar the former from the relief they now seek, I cannot regard; not only is the allegation sufficiently disproved, but I am satisfied that the doctrine of acquiescence, operating as an absolute surrender of an exclusive right, is inapplicable to the case. The consent of a manufacturer to the use of imitation of his trade-mark by another, may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether expressed or implied, when purely gratuitous, may certainly be withdrawn, and when implied, it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license."

1. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 327. In *New York, etc., Cement Co. v. Copley Cement Co.*, 44 Fed. Rep. 277, a cement manufacturer, a resident of Rosendale, *New York*, sought to enjoin a non-resident manufacturer of cement from using the same name to designate his goods. It was held that a geographical name cannot be protected as a trade-mark, even where the defendant is not a resident of the district or city described by the name, and where goods made at

the particular locality have acquired a particular name and reputation, and the use of a name by a manufacturer not residing in the locality is a clear fraud upon the manufacturers who do reside there and liable to deceive the public to its injury. It is a case of *damnum absque injuria*. Mr. Justice Bradley said: "If a person seeks to restrain others from using a particular trade-mark, trade name, or style of goods, he must show that he has an exclusive ownership or property therein. To show that he has a mere right in common with others is not enough."

In *Southern White Lead Co. v. Coit*, 39 Fed. Rep. 492, Blodgett, J., sustains "Southern" and "South Western White Lead St. Louis," as a trade-mark. This case rests rather upon the complainant's rights in the arbitrarily selected words, "Southern White Lead Co." and "South Western White Lead," than upon any rights which the complainant had in the word "St. Louis."

In *Evans v. Von Lear*, 32 Fed. Rep. 163, Colt, J., said: "In the absence of fraud, the complainants cannot enjoin the defendant from the use of a geographical name. . . . The fact that such use by another person may cause the public to make a mistake as to the origin or ownership of the product, can make no difference, if it is true in its application to the goods of one as to the other. Purchasers may be mistaken, but they are not deceived by false representation, and equity will not enjoin against telling the truth. It is manifest, then, that to entitle the complainants to any of the relief sought by this bill, some fraud must be proved."

In *Anheuser-Busch Brewing Co. v. Piza*, 24 Fed. Rep. 149; 148 P. & S., Wallace, J., said: "Although the complainant cannot have an exclusive property in the words 'St. Louis' as a trade-mark, or an exclusive right to designate its beer by the name 'St. Louis Lager Beer,' yet, as its beer has always been made at that city, its use of the designation upon its labels is entirely legitimate; and if the defendant is diverting complainant's trade, by any practices designed to mislead its customers, whether these acts consist in simulating its labels, or representing in any other way his products as those of the complainant, the latter is entitled to protection."

Pratt, a refiner of oil in New York

City, adopted the word "Astral" as a trade-mark in 1869. In 1881, the defendant, an oil refiner at Oil City, Pa., built an oil refinery and called it Astral Refinery. The railroad located a station at the factory and called it Astral. The government established a postoffice and called it Astral, and a small town grew up around the factory, and was called Astral. The word Astral had previously been used to designate a lamp, an "Astral Lamp." It was held that whatever rights the plaintiff might have had in the word, the defendant, manufacturing at a town known as Astral, could not be enjoined from using the name as a trade-mark for his oil. *Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492. This case was dismissed on appeal to the supreme court under the 10th rule, 136 U. S. 647; but it would probably have been sustained on the ground of estoppel, after the plaintiff had permitted the name to become geographical it was too late to complain.

In *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125, an injunction was granted, notwithstanding the fact that the word "St. Louis" was used as a part of the company name; but the combination of the words, "Southern St. Louis" and "Southern Company St. Louis" were the name of the complainant corporation and to a great extent fanciful, besides which the court says the brand used by the defendants is so like the complainant's as to induce the public to mistake the one for the other.

In *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599, "Glendon" was the name of the town in which the business of both complainant and defendant was carried on. It was contended by the appellant, that this case was taken out of the general rule, inasmuch as the trade-mark was adopted prior to the incorporation of the borough, and before there was any town in that place. But the court said: "We see nothing in the facts of this case . . . to take it out of the general rule, which denies to one the exclusive use, as a trade-mark, of the name of the town in which the same kind of goods are manufactured by others. The commission of a lawful act does not become actionable, although it may proceed from a malicious motive." The underlying ground of this case is like that of *Pratt* or *Astral v. Estoppel*, 27 Fed. Rep. 492. There was a time

b. THE ENGLISH RULE.—The rule has been long established in *England* that a defendant will not be permitted to state the origin or ownership of his own goods in any manner, true or false, which will enable him to impose upon the public and sell his goods, as and for those of another. This rule has been applied to geographical terms, and defendants have been frequently restrained from falsely employing such terms when they were not residents of the particular locality indicated thereby, and in some cases the courts have gone so far as to restrain a resident from using the name of the town where he did business, as a designation for his goods, when another had previously employed the same name upon similar goods and had established a reputation therefor, and the use by the defendant of the name gave rise

when the complainant might have saved its rights; but having lost them, they cannot be asserted.

In *Lea v. Wolf*, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 5, Fancher, J., said: "As a general rule, geographical names cannot be appropriated as trade-marks, but the rule has its exception, where the intention in the adoption of the descriptive word (by the second user) is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trade-mark."

In *Newmann v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588, Earl, J., said: "Yet it is quite clear that the plaintiffs, upon the facts, are entitled to protection against the defendant. It is sometimes said in the cases to which our attention has been called that the claimant to a trade-mark, must have the exclusive right to it. This form of expression, I apprehend, is not strictly accurate; the right must be exclusive against the defendant. It is generally sufficient in such cases if the plaintiffs have the right, and the defendant has not the right to use it. The principle upon which the relief is granted is, that the defendant shall not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the plaintiff."

See also *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Lea v. Wolf*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 391; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Wolfe v. Goulard*, 18 How. Pr. (N. Y. Supreme Ct.) 64; *Canedee v. Deere*, 10 Am. Law Reg. N. S. 694.

In *Whitfield v. Loveless*, 64 Pat. Off.

Gaz. 442, Collins, J., said: "Defendant selected the name 'Columbia Hotel,' for the name of the hotel run by him in Chicago. The name had, prior to that time, been used by the complainant to designate his hotel, and he files this bill to enjoin defendant from further use. There are only two questions to be considered on the exceptions to the master's report, all the other allegations of the bill being sustained by the evidence. The first is the defense of laches; the second is the name 'Columbia,' a geographical name and not subject to exclusive appropriation by any person. The court finds, as to the first proposition, that the complainant has not been guilty of laches. As to the second proposition, it will be necessary to consider somewhat critically the sense in which the word 'Columbia' is used. It is a collective noun and is here used in apposition. A noun or adjective, to come within the rule against the appropriation of a geographical name, must be *sui generis* and not collective. To illustrate: German, Swedish and French are *sui generis*, carry a fixed and definite meaning to all minds, under all circumstances, refer to particular countries, and used in connection with a noun, their meaning can never be mistaken. They are the only adjectives that can be directly used to express the fact that any commodity or manufactured article of the country in question, or that the business there carried on is conducted in accordance with the customs of the country to which the adjectives refer. Other nouns and adjectives, while in a loose sense geographical, are not in fact so. It is true that in *Bolander v. Peterson*, 136 Ill. 215, the court says: 'A generic name, or merely descriptive of the

to danger that his goods might be sold for those of the complainant. It is thought that the distinction between the English and American rule will be found in the fact that in *England*, if the court finds from the evidence that the geographical name used as a trade-mark has by long and extensive use acquired a secondary meaning, which causes it to indicate to the public, not only the locality at which the goods are made, but also their ownership and origin, the geographical term will be protected as a trade-mark, the defendant being permitted, however, to state the truthful origin of his goods in such a manner as to avoid, as far as possible, all danger of 'deceiving the public and causing them to buy his goods as and for those of the first user.'¹

article made or sold, or its qualities, ingredients, or characteristics, and which may be applied truthfully by other makers or dealers, is not entitled to protection as a trade-mark.' In conclusion the court says: "Moreover, as we have before seen, to constitute such trade-mark or name as will give the first who applies the same the exclusive right to its use, it must not be such as will merely indicate the composition or quality of the article to which it is applied, or to the particular country or district where produced or manufactured. The reason of the rule is clearly this, that a generic name is not to be used where every person is equally entitled to its use, the design of the law being not to foster monopolies, or to tolerate their existence; but where a name, although generic and geographical, does not indicate that the business there carried on is to be patronized by the people of any particular locality, or that any specific product is there to be sold, or any particular language is there to be spoken, it cannot be a generic or geographical name within the meaning of the rule. In the selection of the word 'Columbia' the complainant chose merely a fanciful name. It indicates no people, no locality, no particular service which his hotel will render. It does not hold out the idea that people patronizing his hotel will have any accommodations or advantages different from those offered by any other hotel. So that, in the case cited, in the selection of this name, it is not such as to indicate the composition or quality of the article to which it is applied or the particular country or district where produced or manufactured, or to indicate the particular manner in which the business is there carried on. The court finds, then, that

the word 'Columbia' is a fanciful name; that the person first selecting it is entitled to its use, for the reason that by its selection and exclusive use no monopoly is created, and on the further broad legal ground that that which is prior in time is first in right. *Ex p. Mississippi Glass Co.*, 64 Pat. Off. Gaz. 713, and cases cited; *Osgood v. Allen*, 1 Holmes (U. S.) 185; *New York Law J.* May 31st, 1890."

1. In *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508, Lord Chancellor said: "Now what is 'Glenfield?' Glenfield is not a town like Burton upon Trent, from which ale is named and in which there are many manufacturers of the so-called 'Burton Ale.' Nor is it a place which has any special circumstances connected with it which would make the starch manufactured there particularly good. But it simply happened that this starch was manufactured at the place called Glenfield, which is really only a place of about sixty inhabitants. It is not a parish, it is not a hamlet, it is not a district of any special character; but it was an estate of that name upon which some people seem to have erected some houses or manufactories." L. Westbury said: "I take it to be clear from the evidence, that, long antecedently to the operations of the respondent, the word 'Glenfield' had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred. The word 'Glenfield,' therefore, as a denomination of starch, has become the prop-

erty of the appellants. It was their right and title in connection with the starch."

In *Montgomery v. Thompson*, 64 L. J. R. N. S. 749, Lord Herschell said: "The respondents have carried on business as brewers at Stone, in the county of Stafford, a town of six or seven thousand inhabitants, for upwards of a century. There have been, practically speaking, no other breweries carried on there. The ales manufactured by the respondents have gained a high reputation, and although in advertising them the name of Joule & Co., under which the brewing business was carried on, has generally been associated with the words 'Stone Ale,' yet, it is, I think, beyond dispute that the respondent's ales have become known to the market and to the public under the terms 'Stone Ales' or 'Stone Ale,' the latter being exclusively applied to a particular quality of beer, and any one asking for 'Stone Ales' or 'Stone Ale' would desire to be supplied, and expect to be supplied, with the ale manufactured by the respondents. The appellant, who is a licensed victualler owning public houses in Liverpool, has recently established a brewery at Stone. The court below came to the conclusion that he intended to use the terms 'Stone Ale' and 'Stone Ales' in connection with liquor of his own manufacture, with a view of leading to the belief that the ales he sold were those, which, as I have said, had become known to the market and the public, and thus obtaining advantage of the reputation which the respondents' ales had acquired. An injunction was accordingly granted on the application of the respondents, restraining the defendant from carrying on business of a brewer at Stone, under the style of 'Stone Brewery,' or 'Montgomery's Stone Brewery,' or under any other title so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling or causing to be sold any ale or beer not of the plaintiff's manufacture, under the term 'Stone Ales' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiff's manufacture, and from infringing the plaintiff's registered trade-mark, or any of them."

In this case it was contended at the bar that no injunction ought to issue for the reason that the term "Stone," being the name of a town, all persons doing business in that town and mak-

ing ale there, had an equal right to use the word "Stone" to designate their place of manufacture.

As a general proposition this argument was not denied, but the court says: "The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name. It seems to me idle to argue that it is against public interest to permit a monopoly of the use of the name of a town for trade purposes when the only effect of allowing its use by the person and for the purpose sought to be restrained, would be to deceive the public."

Lord Hannen said: "I think" the evidence "ought to satisfy your lordships that the respondents' goods had acquired by long usage, the name of 'Stone Ale' and 'Stone Ales,' that that name does not merely convey the idea that the beer was manufactured at Stone, but that it was of the respondents' manufacture. The appellant is undoubtedly entitled to brew ale at Stone and to indicate that it was manufactured there; but there are various means of stating that fact without using the name which has now become the designation of the respondents' ale."

In *Lee v. Haley*, L. R., 5 Ch. App. 161, Giffard, L. J., said: "I agree that there is no property in the name 'Guinea Coal Company,' but the principle upon which the cases upon this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

In *Siexo v. Provizende*, L. R., 1 Ch. 192, the vineyards of both plaintiff and defendant were called "Siexo." Lord Cranworth said that, "That did not justify the defendants in adopting a device or brand, the probable effect of which was to mislead the public when

c. RIGHTS OF RESIDENTS AGAINST NON-RESIDENTS IN A GEOGRAPHICAL TERM.—In the *United States*, under a recent decision,¹ it is doubtful whether a resident of a town or district may monopolize the name thereof as a trade-mark to any greater extent, as against a non-resident, than as against a resident; but the case referred to is one in which the geographical term employed indicated local origin, character or quality merely.

But the English cases,² and some of the older American cases,³ hold, that where a geographical name, although indicating, and used for the purpose of indicating, the local origin of manu-

purchasing their wine, to suppose that they were purchasing wine produced, not from the vineyards of the defendant, but of the plaintiff."

In *McAndrew v. Bassett*,⁴ De G. J. & S. 380, Sir W. P. Wood, V. C., said of "Anatolia," the name of a large tract of country where liquorice root is largely grown: "The plaintiffs have established beyond all doubt the connection of their name with that mark that is beyond dispute. I cannot treat the word as being otherwise than a designation mark which the plaintiffs have caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property." And, in addition to this, Lord Westbury, C., said: "I am told that the word 'Anatolia' being a general geographical expression—being, in point of fact, the geographical designation of a whole country—is a word common to all, and that in it therefore there can be no property. That is nothing in the world more than a repetition of the fallacy which I have frequently had occasion to expose. Property in a word for all purposes cannot exist, but property in that word, as applied by way of a stamp upon a stick of licorice, does exist the moment the licorice goes into the market so stamped and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality or of some other circumstance that renders the article so stamped acceptable to the public."

For further illustrations, see *Taylor v. Taylor* (Persian Thread), 23 L. J. Ch. 255; *Hine v. Lart* (Ethiopian Stockings), 10 Jur. 106; *Southorn v. Reynolds* (E. Southorn, Brosely), 12 L. J. N. S. 75; *Radde v. Norman* (Leopoldshall Kainit), L. R., 14 Eq. 348; *Apollinaris Co. v. Edwards*, Seton (4th ed.) 237; *Apollinaris Co. v. Norrish*, 33

L. J. N. S. 340; *Powell v. McNulty* (Yorkshire Relish), Dig. 526; *Siebert v. Findlater* (Angostura Bitters), 7 Ch. Div. 801; *Davis v. Taylor* (Ferndale Coal), M. R., April 24th, 1879; *Hirst v. Denham*, L. R., 14 Eq. Cas. 542; *Cocks v. Chandler*, L. R., 11 Eq. 446; *Bulloch v. Gray* (Loch Katrine Whisky), 19 Jour. of Jurisp. 218.

1. *New York, etc., Cement Co. v. Copley Cement Co.*, 44 Fed. Rep. 277. See *supra*, this title, *Geographical Terms—General Rule in United States*, where this case is set out at length, and also the earlier cases.

2. See *supra*, this title, *English Rule*. *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508; *Montgomery v. Thompson*, 64 L. T. N. S. 749; *Lee v. Haley*, L. R., 5 Ch. App. Cas. 161; *Siexo v. Provezende*, L. R., 1 Ch. 192; *McAndrew v. Bassett*, 4 De G. J. & S. 380; *Taylor v. Taylor* (Persian Thread), 23 L. J. Ch. 255; *Hine v. Lart* (Ethiopian Stockings), 10 Jur. 106; *Radde v. Norman* (Leopoldshall Kainit), L. R., 14 Eq. 348; *Apollinaris Co. v. Norrish*, 33 L. J. N. S. 242; *Powell v. McNulty* (Yorkshire Relish), Dig. 526; *Siebert v. Findlater* (Angostura Bitters), 7 Ch. Div. 801; *Davis v. Taylor* (Ferndale Coal), M. R., April 24th, 1879; *Hirst v. Denham*, L. R., 14 Eq. Cas. 542; *Cocks v. Chandler*, L. R., 11 Eq. 446; *Bulloch v. Gray* (Loch Katrine Whisky), 19 Jour. of Jurisp. 218.

3. See *supra*, this title, *Geographical Terms; General Rule in United States*. *Anheuser-Busch Brewing Co. v. Piza*, 24 Fed. Rep. 149; 143 P. & S.; *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588; *Lea v. Wolf*, 15 Abb. Pr. N. S. (N.Y. Supreme Ct.) 5; *Evans v. Van Laer*, 32 Fed. Rep. 153; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599; *Brooklyn White Lead v. Masury*, 25 Barb. (N. Y.) 416; *Whitfield v. Loveless*, 64 Pat. Off. Gaz., p. 442.

factured goods, had, in consequence of the fact that a single manufacturer had, for years, been the only person to manufacture a certain class of goods at the particular place, and had used the name thereof as his trade-mark, come to indicate to the public that the goods upon which such name appeared were of the manufacture of a particular person or factory, such term had by use assumed a secondary meaning, which, when it was applied to those particular goods, caused it to indicate clearly to the minds of the public both ownership and origin, and the first user of the name would be held to have acquired a property in the word, which, while it will not be sufficient to prevent all other residents of the same region from using the same name upon their goods of the same class, to truthfully indicate their place of manufacture, will still require that the geographical term shall be so used by others, as not to be a trade-mark, and to avoid the danger of having the goods of others sold as and for those of the man who had first used the name as a trade-mark and given reputation and value to it.

d. GEOGRAPHICAL WORD NOT USED IN A GEOGRAPHICAL SENSE.—A geographical term, used in a purely fanciful sense by a non-resident of a locality, and in such a manner as to be innocent of misrepresentation as to origin, may be upheld and protected as a trade-mark, on the same principle that fictitious names are protected.¹

The application of this rule will in a great measure depend upon the fact whether or not the geographical name is so well known as necessarily to imply the location of origin.

e. NAMES OF MINERAL SPRINGS.—The names of mineral springs, although necessarily to some extent geographical, and always indicating location, have been uniformly sustained as valid trade-marks, wherever the springs were the exclusive property of the party asserting the ownership of the name as a trade-mark. It is true that such names are, as a rule, arbitrary, and hence, for this reason, unobjectionable as trade-marks; but even

1. *Whitfield v. Loveless*, 64 Pat. Off. Gaz., p. 442.

In *Fleischman v. Schuckmann*, 85 P. & S.; 62 How. Pr. (N. Y.) 92, Van Vorst, J., in speaking of "Vienna Bread," said: "The plaintiff and his assignor were the first to use it here or elsewhere, to distinguish a manufacture of bread. As a mark for bread it is purely arbitrary, and is in no manner descriptive either of the ingredients or quality of the article. . . . By the use of the word Vienna in that connection, no deception is practiced, because the place of its manufacture is given, and it is known that bread cannot be imported from abroad for use here." See also the following cases, where

geographical terms, used in a fanciful sense, have been upheld as valid trade-marks: *Messerole v. Tynburg*, 4 Abb. Pr. (N. Y. C. Pl.) 410, *Hirst v. Denham*, L. R., 14 Eq. Cas. 542 ("Liverpool" for cloth made at Hieddersfield, Eng.); *In re Cornwall*, 12 Pat. Off. Gaz. 312 ("Dublin Soap" made in U. S.); *In re Green*, 8 Pat. Off. Gaz. 729 ("German Soap," made in U. S.); *Bulloch v. Gray*, 19 Jour. of Jurisp. 218 ("Loch Katrine Distillery"); *Siebert v. Findlater*, 7 Ch. Div. 801 ("Angostura Bitters"); *Pike v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Green Mountain, Willoughby Lake, Indian Pond* (Scythe Stones). See also *supra*, this title, *Fictitious Names*.

where they are not arbitrary, they have been upheld where the claimant was the exclusive owner of the springs.¹

1. In *La Republique Francaise v. Schultz*, Trade-Mark Record, Aug. 16th, 1893, Townsend, J., said: ". . . In the Industrial Property Treaty of 1887, these three expressions are used: 'Marque de fabrique,' translated 'trade-mark,' 'Marque de commerce,' translated 'commercial mark,' 'Nom commercial,' translated 'commercial name.' The treaty provides that every 'trade-mark or commercial mark,' regularly deposited in the country of origin, shall be admitted to deposit, and so protected in all the other countries of the union" (26 U. S. Stat. at L., art. VI., p. 1376). And the final Protocol, on page 1380, paragraph 4, is as follows: "Paragraph I, of article VI., is to be understood in the sense that no trade or commercial mark shall be excluded from protection, in one of the states of the union, by the mere fact that it may not satisfy, in respect to the signs composing it, the conditions of the laws of this state, provided that it does satisfy in this regard the laws of the country of origin, and that it has been in this latter country duly deposited. Saving this exception, which concerns only the form of the mark, and under reservation of the provisions of the other articles of the convention, the domestic legislation of each of the states shall receive its due application."

Article VIII. of the treaty is as follows: "The commercial name shall be protected in all the countries of the union, without obligation of deposit, whether it forms part or not of a trade or commercial mark."

The question raised by this demurrer is whether the word "Vichy" is a trade-mark or commercial mark, in which case it is claimed that it can receive no protection without registration, or a commercial name, as to which no such obligation exists. It is not alleged in the complaint that the word "Vichy" has been registered. Whether such registry is required in the case of a trade or commercial mark, it is unnecessary to consider. It is only necessary to inquire whether the word "Vichy" is or is not a *nom commercial*, or commercial name.

As the two terms, "commercial mark" and "commercial name," used in the treaty, are translations of terms used in the civil law of *France*, it be-

comes necessary to examine their meaning in said system, in order to understand the distinction between them.

The distinction between a trade-mark and a commercial mark is pointed out by Pouillet, in his work on "Marques de Fabrique," section 6, from which I translate as follows: "A trade-mark is not a commercial mark, and it is with reason that the law mentions both. The trade-mark is especially or peculiarly the mark of the manufacturer, of him who creates the product, who manufactures it. The commercial mark is that of the dealer, of him who, receiving the product of the manufacturer, sells it, in his turn, to the consumer." And again, in section 63: "A name of a town, or more generally, a name of a locality, may, like an ancestral name, serve as a trade-mark; yet, here still, it is on condition that the name shall be presented under a distinct, special form, always the same. It is this peculiar expression which constitutes the mark, and not the name taken separately, and for itself." It will thus be seen that our word trade-mark comprehends both the *marque de fabrique* and *marque de commerce* of *France*. Browne on Trade-Marks, § 85.

Under the title "Nom Commercial," Pouillet divides the various classes of commercial names into the general head of names of manufacturers and names of localities. He defines the commercial name as follows: Section 374. "The commercial name is the name of the individual, or any name which is the property of a merchant, without reference to its use as a mark, or trade-mark, in a distinctive form. . . . It is the name considered as the accessory of the business, as the *pavillon de la marchandise*, which I understand to mean 'sign,' or 'brand,' or 'standard,' of the goods." He adds: "M. Gastambide says, speaking of the name from a commercial point of view, 'The name will be for us a mere means of securing good-will.'" Under sections 394-411 of "Noms Commercial," the author includes names of places, and discusses fully the rights of parties, under the law of *France*, who claim the exclusive use of a name of a locality, including owners of mineral waters or springs.

It therefore appears that the name

"Vichy" is a commercial name, and, as such, is protected under the Industrial Property Treaty, without obligation of deposit, whether it does or does not form part of a trade or commercial mark.

Where the city of Carlsbad, Bohemia, sole owner of the mineral springs there, for fifty years has sold the salt therefrom as "Carlsbad Salts," etc., other parties will be restrained from using these words for similar artificial productions, even with the word "Artificial" prefixed. *Carlsbad v. Thackeray*, 57 Fed. Rep. 18.

The doctrine seems to be impliedly recognized that the exclusive owner of a natural product has a right to restrain the use by others of the name of that natural product, unless applied by them to the original product itself, which is obtainable, directly or indirectly, only from the exclusive owner. *In re Apollinaris Co.'s Trade-Marks*, 61 L. J. Ch. 625. See *Luyties v. Hollandeer*, 30 Fed. Rep. 632.

A contract being entered into between plaintiff and defendant for the sale of "Clysmic Water," from plaintiff's spring of that name, defendant sold other waters under the same name. *Dyer, J.*, said: "Limiting this decision, as we do, to an adjudication of the rights of the complainant and the defendant, Lockwood, during the continuance of the contract relations subsisting between them, we must hold that the name 'Clysmic' became affixed and appurtenant to the complainant's spring, as indicating the source of the water known to the public as 'Clysmic Water,' and that the complainant cannot be deprived, in the manner attempted by the defendant, of the advantage which has accrued to her, as the purchaser of the spring, from such designation." *Hill v. Lockwood*, 32 Fed. Rep. 389.

Complainant contracted with the owner of a spring in *Hungary*, by which he acquired the exclusive right to export and sell the water in *Great Britain and America* under its name of "Hunyadi Janos." Defendant purchased water from those to whom it had been sold in *Germany* and resold it in the *United States* in the same form. An injunction to prevent defendant selling the water was refused, *Wallace, J.*, saying: "No doubt is entertained that the name when applied to the water is a valid trade-mark, and that the complainant should be pro-

TECTED against the unauthorized use of the trade-mark by another. . . . But the defendant is selling the genuine water, and therefore the trade-mark is not infringed. There is no exclusive right to the use of a name or symbol or emblematic device except to denote the authenticity of the article with which it has become identified by association. The name has no office except to vouch for the genuineness of the thing which it distinguishes from all counterfeits; and until it is sought to be used as a false token to denote that the product or commodity to which it is applied is the product or commodity which it properly authenticates, the law of trade-mark cannot be invoked." *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18.

A natural product, such as mineral water, which has become private property, may be the subject of a trade-mark consisting of that name. *Hunyadi Janos*" case, Ct. of Cassation (*France*), Bulletin Officiel No. 2, p. 26. *Browne on Trade-Marks*, § 191.

Complainant was the lessee of a spring known as the "Apollinaris Spring," and defendant used the word "Apollinaris" in connection with water compounded by him. An injunction was granted. *Apollinaris Co. Limited v. Moore*, C. C. U. S. E. D. of Pa., *Cox's Man. Trade-Mark Cases* 675.

In the Cromac district in Belfast, numerous springs of water were found, commonly known as "Cromac Springs," and the water therefrom as "Cromac water." The water was much used in the manufacture of aerated waters which were generally described as "manufactured from the Cromac Springs" or as "Cromac Water." Plaintiff had one of these springs on his premises, and adopted the words "Cromac Springs" as his trade address, registering it after several years' use as his trade-mark. Defendant also had one of these springs on his premises, and adopted the same words as his trade address. The court said: "Any maker of aerated water is entitled to say that he manufactures his waters from these 'springs,' or 'waters,' or 'wells,' if the fact be so. But that does not in the slightest degree interfere with the right of a person, under proper circumstances, using the words 'Cromac Springs' as a trade-mark (*citing the 'Anatolia'* case with approval). . . . I am of opinion that the plaintiffs did appropriate the words 'Cromac Springs' as a trade-

mark, and not merely as a description of the material used by them. They used the name as the designation of their factory or place of business, and so connected their goods with it that they became known to buyers and consumers by that name." *Wheeler v. Johnston*, L. R., 3 Ir. 284. In this case, an injunction was granted to restrain defendant from using the words "Cromac Springs" in connection with his trade as a manufacturer or seller of mineral waters, so as to represent that his said waters were so manufactured or sold by plaintiffs at their works, called the "Cromac Springs;" or from using the words "Cromac Springs" as the name of defendant's place of business so as to represent as aforesaid.

The word "Apollonis," in connection with a representation of a bow and arrow, was used by defendants on labels and bottles. Plaintiffs used, in the same way, the word "Apollinaris" and the device of an anchor, which was calculated to mislead. A preliminary injunction was granted. *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatch. (U. S.) 380.

The owner of a peculiar natural product (as the water of a mineral spring), which has acquired reputation, etc., in the market, is entitled, like the manufacturer of artificial products, to have his original trade-mark protected. The name "Bethesda," applied to a mineral spring and the waters thereof, is a proper trade-mark and capable of protection against one who owns another spring within twelve hundred feet of that of plaintiff, although the water has same constitution and properties, the name "Bethesda" not being a geographical designation of any district within or near which either of said springs is located. *Dunbar v. Glenn*, 42 Wis. 118.

Plaintiffs were the exclusive importers of Apollinaris water into *England*, under a contract with the owners of an Apollinaris Spring in *Germany*. Defendants used the word "Apollinaris" in connection with waters not genuine. An injunction was granted. *Apollinaris Co. v. Edwards*, Seton (4th ed.) 237; *Cox's Man. Trade-Mark Cases* 509.

Plaintiffs having the exclusive right of selling "Apollinaris Water" in *Great Britain*, defendants made and sold an artificial mineral water under the name and description of "London Apollinaris Water, possessing all the properties of the natural water." An injunction was

granted to restrain defendant's use of the words "London Apollinaris Water" or any other name of which the word "Apollinaris" so forms a part as to be calculated to mislead the public into purchasing the artificial for the real water of that name. *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

Plaintiff, having the exclusive right of importing from Leopoldshall mines in Duchy of Anhalt, a rock salt called "Kainit," sold it as "The Genuine Leopoldshall Kainit." Defendants sold salt, not that imported from Leopoldshall mines, as "Kainit (Leopoldsalt)." An injunction was granted. *Radde v. Norman*, L. R., 14 Eq. 348; 41 L. J. Ch. 525; 26 L. T. N. S. 788; 20 W. R. 766. See also *Braham v. Beachim*, 7 Ch. Div. 848; 47 L. J. Ch. 348; 38 L. T. N. S. 640; 26 W. R. 654, where the practical owner or lessee of all the collieries within a parish, obtained an injunction against defendants restraining the use by them of the name of the parish in their firm name, until they should become owners or lessees of collieries within that parish.

Although where a person "has found out an article which is a natural product, and has given that natural product a name," that name becomes designatory of the natural product and may be generally used, *Young v. Macrae*, 9 Jur. N. S. 322; yet the exclusive owner of that natural product has a right to designate it by a trade-mark exclusively his own. So in the leading case of *Congress, etc., Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82, *reversing* 57 Barb. (N. Y.) 526, the plaintiffs, being purchasers of the "Congress Spring" at Saratoga, continued, as their predecessors had done, to sell the medicinal water from the spring as "Congress Water." The defendants began to use the word "Congress" in their corporate name and in connection with the water from another spring. It was decided that the owner of a peculiar product of nature, who has applied to it a conventional name by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name as his trade-mark in the sale of the article. Also, that where the spring first known as and named "Congress Spring" produces mineral water of peculiar properties possessed by no other spring, the words "Congress Water"

8. **Utility of Distinguishing Mark.**—All things or methods useful in manufacturing, or preparing, or packing goods for market, which are not patented, are free and open to the public to use, and cannot be monopolized by anyone under the guise of a trade-mark. To allow such a practice, would soon result in the adoption of common forms of packing and marking as private trade-marks, which would greatly hamper trade and inconvenience the public, without yielding any corresponding benefit.¹

and "Congress Spring Water" appropriately indicate the origin and ownership of water from the "Congress Spring," and the word "Congress," used in connection with the sale and bottling of such water, is a proper and legitimate trade-mark.

The words "Geyser Spring" were refused registration as a trade-mark for Saratoga mineral water, on the ground that it is a familiar geological term and has a meaning well known to the public, and is therefore generic and descriptive. *Ex p. George S. Batcheller, Browne on Trade-Marks*, § 276.

1. *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337. There can be no trade-mark in the coating of nails with bronze to make them more popular and salable. *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205.

The size, or shape, or mode of construction of a box, barrel, bottle, or package in which goods may be put, is not a trade-mark; nor is the mechanical arrangement of bottles in boxes in which they are packed by the manufacturer capable of protection as such. *Hoyt v. Hoyt*, 143 Pa. St. 623. In this case, Williams, J., said: "As a general proposition, it may be said that one may imitate what is excellent in the processes and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products."

In *Colgan v. Danheiser*, 35 Fed. Rep. 150, the court refused to enjoin defendants from imitating the peculiar method of packing and labeling chewing gum used by plaintiffs, it not appearing in evidence that complainants, by so doing, had established a reputation in the market for their goods.

In *Adams v. Heisel*, 31 Fed. Rep. 279, Welker, J., said: "In this case the complainants could not obtain a trade-mark for the form of the sticks of chew-

ing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes."

A strip of leaf tobacco placed as a wrapper around the mouth-piece or end of a cigarette was denied registration, the leaf serving a mechanical and useful, more than a distinctive, purpose. *In re Gordon*, 12 Pat. Off. Gaz. 517.

There can be no trade-mark in any method of arranging various packages of merchandise in the receptacle containing them. *Davis v. Davis*, 27 Fed. Rep. 490.

Nor can there be a trade-mark in a piece of tin, regardless of its color, shape, or inscriptions, used as a tag on tobacco, although by the use of such device, said tobacco may have acquired a reputation in the market as "Tin Tag Tobacco." *Lorillard v. Pride*, 28 Fed. Rep. 434; *Blodgett, J.*, observing: "It seems to me it would be as reasonable to assume that the complainants could have adopted paper or wood, or a piece of cloth or leather, as a badge or indicia of their goods, as that they could have taken a piece of tin. . . .

A person may appropriate any word, figure, or emblem as a trade-mark, but that does not give an exclusive right to the use of the well-known material substances upon which the word, figure, or emblem may be impressed or engraved."

A covering for soap consisting of tin foil with a blue band around it, cannot be exclusively appropriated as a trade-mark. The court, by Rapallo, J., said: "There is nothing peculiar about it, and it is an appropriate and usual form in which to put up small cakes of soap, and the law of trade-marks has not yet gone so far as to enable a party to appropriate such a form of package and fashion of label, and exclude everyone else from its use, or from the use of anything resembling it. If it had, the different forms and fashions of cigar boxes,

V. DOCTRINE OF ORIGIN AND OWNERSHIP—1. In General.—A trade-mark is protected by the courts of equity, on the broad ground that every honest manufacturer and trader who, by careful work, and the expenditure of time, labor, and money, has built up for

packages of chewing tobacco, perfumery, canned goods, and other small articles, and the color or style of labels which every dealer, according to his taste, adopts or selects from those in use, would afford food for litigation, sufficient to give constant occupation to the courts." *Enoch Morgan's Son's Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294, *reversing* 23 Hun (N. Y.) 632; 57 How. Pr. (N. Y.) 121.

See *Enoch Morgan's Son's Co. v. Schwacher*, 5 Abb. N. Cas. (N. Y.) 265, where the court says that "the plaintiffs cannot have an exclusive right to use tin foil or ultramarine blue-colored paper, in putting up their article, as such paper is much used for ordinary commercial purposes." This case was, however, decided against the defendants on the ground of unlawful imitation.

A "representation of a barrel consisting of light and dark wood, the staves being alternately composed of each color" cannot be registered as a trade-mark for flour packed in barrels similar to that represented in the picture, because in such application it is descriptive, not, indeed, of the quality of the flour itself separated from its package, and, therefore, not in marketable form, but of the marketable commodity, the barrel of flour. But when applied to sacks of flour, or to barrels of flour having staves all of one color, it is an arbitrary symbol and is registrable as a trade-mark. *Ex p. Halliday Bros.*, 16 Pat. Off. Gaz. 500.

In *Dausman, etc., Tobacco Co. v. Ruffner*, 15 Pat. Off. Gaz. 559, it was held that a registration trade-mark for plug tobacco, consisting of one longitudinal line dividing the plug into equal parts, and a series of transverse lines crossing the plug at right angles with the longitudinal line, and at equal distances from each other, will not prevent the use of a trade-mark for tobacco, consisting of a series of seven Greek crosses stamped on the center of the surface of the plug at equal distance from each other, and a series of half crosses on the margin opposite the full crosses, as guides for cutting the plug into pieces. Complainant's tobacco became known in the trade as "Cross Bar Tobacco,"

while that of defendants was put upon the market as "Army and Navy Plug Tobacco." Here the court said: "One of the principles running through the law of trade-marks is that there need be no utility attached to the trade-mark, that is, it shall have no useful purpose in connection with the goods further than to show the origin or manufacture."

The exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with collars, cannot be claimed as a trade-mark. In *Harrington v. Libby*, 14 Blatchf. (U. S.) 128, Johnson, J., said: "The forms and materials of packages to contain articles of merchandise, if such claims should be allowed, would be rapidly taken up and appropriated by dealers, until someone, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property."

Galvanized iron hoops, placed on a liquor barrel of dark color, were refused registration as a trade-mark, as not an original appropriation, and not sufficiently distinctive. *In re Kane*, 9 Pat. Off. Gaz. 105.

Plaintiffs, carpet manufacturers, rolled their carpets upon peculiarly formed sticks, made in two pieces, and with the ends shaped into octagonal rings, which were visible in the center of the roll when made up. This stick had been registered as their trade-mark. Defendants began to use similar sticks for the same purpose. There was evidence that plaintiff's carpets were known to the public by these projecting octagonal rings. An injunction was granted. *Lowell Mfg. Co. v. Larned, Codd*, Dig. 341; *Cox's Man. of Trade-Mark Cases* 428.

A barrel of peculiar form, dimensions, and capacity, irrespective of any marks or brands impressed upon, or connected with, it, cannot become a lawful trade-mark or a substantive part of a lawful trade-mark, although it may be of use, as auxiliary to the trade-mark proper, in making out a case of unlawful imitation. *Moorman v. Hoge*, 2 Sawy. (U. S.) 78.

himself a good reputation, so that goods which are known to emanate from him are accepted by the public with confidence as to their character and quality, reliance being placed upon the maker or vendor and his guaranty of their genuineness and quality, or those who resort to his place of business are assured of the service they will receive, is entitled to have such good reputation protected as one of the most sacred and valuable rights which a man can possess, and that this right, when embodied in a definite form, such as a trade-mark, is treated as property in the hands of the owner of the mark, which equity will protect by injunction and an award of damages for its injury.¹

1. In *Gillott v. Esterbrook*, 48 N. Y. 374; 8 Am. Rep. 553, Lott, C. C., said: "A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may select and adopt, by which they may be known as his in the market, and thereby secure to himself the profits arising from the fact that they are of his manufacture, and he is entitled to the protection of a court of equity in the exclusive use of the peculiar marks or symbols, appropriated by him, designating or indicating the true origin or ownership of the article to which they are affixed against the adoption or imitation thereof by another, so as to mislead the public as to such origin or ownership, and thus affect the sale of his goods as those of the party whose trade-mark is so adopted or imitated."

In *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270; *Cox's Man. of Trade-Mark Cases* 302, Carpenter, J., said: "The office of a trade-mark is to designate the true origin or ownership of the article or fabric to which it is affixed. When any mark, symbol, or device is used merely to indicate the name, quality, style or size of an article, it cannot be protected as a trade-mark. The object or purpose of the law in protecting trade-marks as property is two-fold: first, to secure to him who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; second, to protect the community from imposition, and furnish some guaranty that an article, purchased as the manufacture of one who has appropriated to his own use a certain name, symbol or device as a trade-mark, is genuine."

In *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76; *Cox's Man. of Trade-Mark Cases* 296, Sanderson, J., said: "By the common law, the manufac-

turer of goods, or the vendor of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his, and be distinguished from other like goods manufactured or sold by other persons. The owner of such peculiar marks, provided they are original with him, will be protected in their exclusive use by the courts; but only so far as such marks serve to designate the true origin or ownership of the goods to which they are attached. He will not be protected in the use of figures, or symbols, or combinations of words which serve merely to indicate the name, kind, or quality of the goods to which they are attached, notwithstanding they may be interblended with others which indicate origin or ownership. *Petridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Stokes v. Landgraaf*, 17 Barb. (N. Y.) 608. This rule obviously follows from the admitted policy upon which the law in relation to trade-marks is founded, which is two-fold: to protect purchasers from the fraud and imposition of persons who may seek, by false representations, to dispose of inferior goods of their own manufacture as those of a superior quality and established reputation, manufactured or sold by other parties; and to secure to every manufacturer the merited fruits of his own industry and inventive skill, without, however, creating a monopoly or interfering with the right of everyone to manufacture or sell the same kind of goods."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, Duer, J., said: "The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropri-

The first and critical question always is—Does the trade-mark, for which protection is sought, stand for this valuable thing, the reputation of the honest dealer? Does it carry to the world his personal guaranty of the character and quality of the goods upon which it is used? Does it indicate the origin and ownership of the goods? If it does not, then there is no good name or reputation to be protected, and the court will not interfere.¹

ated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose."

1. Origin and Ownership.—In *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; 5 P. & S., *Am. Trade-Mark Cases*, Johnson, J., said: "A trade-mark is always something indicative of origin or ownership, by adoption and repute, and is something different from the article itself which the mark designates. An invention of structure, a patent for the invention secures; a design is secured by a patent for that. Apart from these, anyone may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person. Any other doctrine is impossible to be maintained; for otherwise all the colors, all the unessential forms, could be monopolized as trade-marks, and exclusive rights would be created, not limited in time, as patents are, founded upon no public utility and subject to no control but the will of the adopter."

In *Caswell v. Davis*, 38 N. Y. 223; 17 Am. Rep. 233, Folger, J., said: "There is no principle more firmly settled in the law of trade-marks, than that words or phrases which have been in common use, and which indicate the character, kind, quality, and composition of the thing, may not be appropriated by anyone to his exclusive use. . . . Nor does it matter that the form of words or phrases adopted also indicate the origin and maker of the article. The combination of words

must express only the latter. . . . Even when the sole purpose of the one who first uses them is to form of them a trade-mark for himself, expressive only of origin with himself, if they do in fact show forth the quality and composition of the article sold by him, he may not be protected in the exclusive use of them."

In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; 1 Pat. Off. Gaz. 279, Strong, J., said: "The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. . . . The reason of this is, that, unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. . . . The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association."

In *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275, Currier, J., said: "The books are full of authorities establishing the proposition that any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark which is adapted to accomplish the object proposed by it; that is, to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves."

In *Ferguson v. Duvall Mills*, 7 Phila. (Pa.) 253, Allison, P. J., said: "Whenever, therefore, the question is presented whether property has been acquired in a trade-mark and the party claiming it is entitled to the protection of the law in its exclusive use, we turn to the case as it is presented for judgment,

If it does, then there is the further question, can the mark be upheld as the exclusive property of one without interfering with the rights or property of others?¹

It has been suggested in some cases that, in order that a trade-mark may indicate ownership and origin, it is necessary that it shall have been used for a sufficient length of time for the trade, to which the particular goods belong, to have learned, by use and association, to know the goods upon which the mark appears as those of the manufacturer or vendor who claims the mark, and that, in the absence of proof of this character, the court cannot say that the mark, no matter how unobjectionable it may be, does in fact indicate ownership and origin, and hence cannot be protected.² But it is thought that this proposition is only a

and endeavor to ascertain whether the letter, name, or device was first appropriated by the claimant, and was intended to designate, and does in fact point out, the article to which it is affixed as sold, or owned, or made by him, or the place of its manufacture or sale. If it does, it is a trade-mark within the true intent and meaning of the term; if it does not, and nothing more is expressed by it but kind, character, and quality, or if it be a name, and is suggestive of no idea with reference to the article to which it is affixed, then the claim must be rejected. In the latter event, it is not declaratory of ownership or origin, nor does it serve to distinguish an article as the production of a particular individual or the place of his business, and if it does not answer this purpose, it does not contain the essential element of a trade-mark. . . . The simplest case of a trade-mark is the name and address of the claimant, and it is absolutely requisite that a device or symbol should perform the office of a finger board; should indicate the name and address of the manufacturer, to invest it with the attributes and entitle it to the protection of a trade-mark."

In *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Upton* 198; *Cox's Man. of Trade-Mark Cases* 187, the court said: "It seems to be assumed that the rule is, that every existing word can be appropriated as a trade-mark, and that the exceptions are those expressing mere quality or kind, whereas the true rule is—that no words can be used by themselves, without other devices, as a trade-mark, except such as point out ownership or origin, and those which have no reference, in any possible way, to any other attribute of the article."

In *Upton* (1860), p. 102, the court said: "The simplest case of a trade-mark fulfilling the condition of the law, and thereby entitling him who adopts it, to protection in its exclusive use, is the name and address of the manufacturer. It is precisely to the extent that any name, device, or symbol, adopted as a designation for merchandise, is effectual in performing the office of the name and address of the manufacturer, that it complies with the essential requisite to the acquisition of an exclusive right to its use." At page 136 it is said: "That a trade-mark, adopted by a manufacturer or merchant, for his goods, to be clothed with the attributes of property, entitling the proprietor to protection in its exclusive use, must, by word, letter, sign, figure or symbol, designate the true origin or ownership of the goods."

1. See *supra*, this title, *What May Constitute a Trade-Mark; What May not Be a Valid Trade-Mark*.

2. In *People v. Fisher*, 3 N. Y. Supp. 786; 50 Hun (N. Y.) 552, *Bradley, J.*, said: "The only recognized indication of a trade-mark is the source, origin, or ownership of the article of merchandise on which it is placed. *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233. This means that the mark is calculated to distinguish the articles which bear it from those of other makers or vendors. It need not indicate any particular person as maker, manufacturer, or vendor, or give the name or address of either. When the mark has become recognized by purchasers as a distinctive designation of a particular maker, manufacturer, or seller of a certain quality of goods, it will be a sufficient indication of the origin or ownership, within the rule requisite to its protection as such,

subtle deduction of some judges who were rather seeking for a reason for denying the relief asked, than for the logical basis upon which the law of trade-marks rests. We take it that, where it is shown that a reputable manufacturer or vendor has adopted a trade-mark for his goods, which is unobjectionable on the well-settled principles of law as to what may and what may not be a trade-mark, and has applied that mark to his goods, accompanied by his name and address, and has sold his goods thus prepared in the

although purchasers may not, from the work or otherwise, be able to tell who is the particular maker or seller of the article. *Godillot v. Harris*, 81 N. Y. 263; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286; abstractly, and apart from its application and use, a trade-mark has no recognized ownership. Its value is in its employment in marking the goods upon which it is placed. This gives to it the character of property. It is then a symbol of reputation or good-will. *Derringer v. Plate*, 29 Cal. 292; *Bradley v. Norton*, 33 Conn. 157; 87 Am. Dec. 200."

In *American Solid Leather Button Co. v. Anthony* (R. I. 1886), 2 N. Eng. Rep. 630; 177 P. & S., Am. Trade-Mark Cases, Stiness, J., said: "But it by no means follows, as a rule of law, that marks indicating style or quality may not also indicate origin, and thus be a subject of trade-mark. A person has the right to affix to his goods any device, symbol, or name, which he may invent, to distinguish such goods from those made by other people. When the symbol becomes known in connection with his name, it serves as a sign and pledge of the origin of the goods."

In *Burton v. Stratton*, 12 Fed. Rep. 696; 103 P. & S., Am. Trade-Mark Cases, Brown, D. J., said: "The difficulty is in distinguishing cases where the property has acquired a generic name, as indicating the quality of the article, rather than its origin or ownership. . . . The only satisfactory rule we have been able to gather from the authorities is that in each case it is a matter for the court to determine, not alone from the mark itself, but from the testimony whether the words have become so well known as to stand in the public eye as denoting the character and quality of the article, and not its origin or ownership. . . . But if the primary object of the trade-mark be to indicate the origin or ownership, the mere fact that the article has ob-

tained such a wide sale that the mark has also become indicative of quality, is not of itself sufficient to debar the owner of protection, or make it the common property of the trade."

In *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286; 79 P. & S., Am. Trade-Mark Cases, Fenner, J., said: "There are authorities holding that it is essential to the validity of a trade-mark that it should indicate the name or address of the manufacturer or seller of the articles, in such manner as to distinguish them as the goods made or sold by the parties claiming the benefit thereof. We consider, however, that the latest and best authorities establish that such particular designation is not essential; but that when a particular form of words or device, otherwise valid as a trade-mark, has been first employed by a particular maker or seller, and has been used by him upon his goods, so long and so exclusively, as to have acquired, by association, an understood reference to such maker or seller as the originator or seller of articles so marked—this will be a sufficient compliance with the law, and will entitle the party to protection."

In *Sheppard v. Stuart*, 13 Phila. (Pa.) 117; 33 P. & S., Am. Trade-Mark Cases, Finletter, J., said: "How is a mark or device to indicate 'true or original ownership,' or to indicate the name and address of the manufacturer? In and by itself alone, this is impossible. It is only by use as the device of him, who distinguishes his goods by it, in order that they may be known as his, that it can ever indicate 'true origin or ownership.' . . . In other words, the evidence must show the first appropriation of the device by the claimant, its application by him to his goods or business; and that the trade or public recognize the article or business by that device as made or sold by him, or belonging to him. In no other way can a mark or device indicate 'true origin or ownership.'"

open market, he is entitled to protection, on the ground that the first sale to an intelligent purchaser gives to the mark its meaning, and such purchaser, after having once bought the goods bearing the mark, and having recognized the fact, as he must be presumed to have done, that the trade-mark stood for and represented the name of the article as made by the particular manufacturer, will ever after, so long as he remembers the article at all, carry in his mind the trade-mark of the vendor, as the sign and seal of its origin and ownership.¹

We think the better distinction, and the only one which can serve any useful purpose in these cases—provided, of course, that the trade-mark is unobjectionable—is, Can a mark, by use, indicate ownership and origin, and was it adopted with that intention, and has it been used for that purpose? If this is found to be the fact, and its use in the regular course of trade proven, then the

1. In *Cigar-Makers' Protective Union v. Couhain*, 40 Minn. 243, Gilfillan, C. J., said: "The theory on which the right to it (trade-mark), as property, is based, is, that a man may have acquired a reputation for excellence in the manufacture or preparation of a certain article for sale, which reputation may be the source of profit to him. In the enjoyment of this reputation, and of the benefit and pecuniary advantages thereof, he ought to be protected, as he ought to be, and is, in the advantages of the good-will of a business established by him; and so that the purchasing public may know the origin of such articles when offered for sale, and that they are of his manufacture or preparation, he may adopt and place on them, as the index of their origin, some device or symbol not used by others upon similar articles, which, by such adoption, and by use in connection with his articles, comes to be known as representing that the articles on which they are placed are made or prepared by him, just as his signature to a business paper is an assurance to others that he executed it. It has, indeed, been likened to his business autograph."

In *Menendez v. Holt*, 128 U. S. 514, in upholding "*La Favorita*" as a trade-mark for flour, Fuller, C. J., said: "The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co., to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence."

In *Stachelberg v. Ponce*, 152 P. &

S., *Am. Trade-Mark Cases*, 23 Fed. Rep. 430, Colt, J., said: "A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311. It imports that the article is made by the original proprietor, and therefore genuine, and the law protects the original proprietor, not only as a matter of justice, but to prevent imposition on the public. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218."

In *Avery v. Meikle*, 117 P. & S., *Am. Trade-Mark Cases*; 81 Ky. 73, Hargis, C. J., said: "It must not be overlooked, however, in these exclusions, that a trade-mark is indirectly the guaranty of the quality of an article to which it is attached, as well as of its origin and ownership, for in all cases the trade-mark, in indicating the origin by necessary implication, represents the quality of the article, which is the true source of its reputation in the market. There is no abstract right in a trade-mark. It is property only when appropriated and used to indicate the origin or ownership of an article or goods, and its real value consists in the confidence and patronage of the public, secured through its instrumentality in acquainting them with the origin and ownership of an article which thus gains reputation for its superior qualities. Of this reputation its owner cannot be deprived without his consent, either by the use of forbidden means or the illegal employment of things otherwise lawful."

property right in the mark should be sustained, as it would be in a commercial signature, which would be protected against forgery the very day of its adoption and use, entirely independent of whether it had become known to the public or not.¹

2. **Acquisition of Title**—*a*. **INSTANT ACQUISITION.**—The question of how title to a trade-mark can be acquired, has generally been answered by the simple statement—by legal adoption and use. But this is not sufficient. It has been stated in many cases, that property right in a trade-mark can be acquired only by legal adoption, meaning, a mark which is legally capable of exclusive appropriation, and which has not previously been used by others for the same class of merchandise or business, and which has been applied to goods and a use in trade, in such circumstances as to publicity

In *Larrabee v. Lewis*, 89 P. & S., Am. Trade-Mark Cases; 67 Ga. 562; 44 Am. Rep. 735, Crawford, J., said: "A trade-mark which designates the true origin or ownership of the article manufactured or sold, will be protected, but words which have no other relation to the origin or ownership of the goods than merely to indicate the name or quality, will not be protected."

The numerals "5 2 3," in connection with the device of an eagle and wreath, may indicate origin as well as quality, and when so intended will be protected as a trade-mark for underwear. *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325; 37 Am. Rep. 362. In this case Colt, J., said: "It has been said that there can be no exclusive right to use marks, figures, and letters which are intended merely to indicate the quality of the fabric manufactured, as distinguished from those marks which are intended to indicate its origin, because one has no right to appropriate a sign, or symbol, or mark which, from the nature of the fact it is used to signify, others may use with equal truth, and therefore have an equal right to employ for the same purpose. . . . These considerations would be decisive, if the plaintiff here claimed the exclusive right to the numerals '5 2 3,' when used only to indicate the quality, and not with reference to the origin, of the goods. But such is not the plaintiff's position. Its claim is that the purpose of using these figures, in connection with the other parts of its trade-mark, was to aid the buyer in distinguishing its goods from similar goods made and sold by others."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Field, J., said: "Every-one is at liberty to affix to a product

of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. . . . The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose, either to the manufacturer or to the public; it would afford no protection to either against the sale of a spurious in place of the genuine article."

1. In *Ransom v. Graham*, 51 L. J. Ch. 897, Bacon, V. C., said: "The law relating to trade-marks has been established by decisions extending over centuries, and although its application has been somewhat modified by the recent statutes relating to trade-marks, and thereby adapted more conveniently to modern usages, the law has undergone no change in its essential principle. That principle may be stated thus: A manufacturer who produces an article of merchandise which he announces as one of public utility, and who places upon it a mark, by which it is distinguished from all other articles of a similar kind, with the intention that it may be known to be of his manufacture, becomes the exclusive owner of that which is thenceforth called his trade-mark."

and length of use, as to show an intention to adopt it as a trade-mark for a specific article.¹

This rule is a very good one, where the facts will allow of its application, and in cases where it is possible, the proof should fully come up to its requirements; but the rule contains an element of uncertainty for which there does not seem to be sufficient reason. How long must the trade-mark be used? How much goods sold under it? How many people must know the mark as belonging to the vendor of the goods? And why should any of these questions be raised? It is thought that the more logical and useful rule, and one for which there is ample authority, is, that the instant a vendor adopts a valid trade-mark to indicate his goods, and applies it to his goods with his name and address, and

1. "Under the English cases, there must be something more than a mere adoption and application of a trade-mark to create an exclusive right at common law. The American cases, however, would seem to be to the effect that, as soon as the mark is applied, it becomes the property of him who is the first to formally make the application." Cox's *Man. of Trade-Mark Cases* 459, note; Browne on *Trade-Marks*, § 52.

In *Robertson v. Berry*, 50 Md. 599, Miller, J., said: "Without noticing at length many other allegations of the bill, the facts thus stated show that the complainants have acquired a property right in the devices, emblems, and title pages in question by adoption and user."

In *Leidersdorf v. Flint*, 8 Biss. (U. S.) 327, Dyer, J., said: "As is well shown by a writer who has with evident care collated the authorities on the subject, vol. 7, *Central Law Journal* 143, the foundation of title to a trade-mark is priority of adoption and actual use in trade, and it neither in application nor discovery necessarily possesses the elements of originality, novelty or invention."

In *Swift v. Peters*, 11 Pat. Off. Gaz. 110, Doolittle, Acting Commissioner, said: "From this it will be seen that it is of no consequence whatever who was first to suggest and urge the adoption of the trade-mark; but the point is, who was first to actually adopt and use the same for the purpose of indicating the ownership or proprietorship of the articles to which the mark is applied."

"For a mark to have been used before the act (1875) it was sufficient for a vendable article to have been actually in the market, bearing the mark in

question; it was not necessary for this to have been the case for any length of time, so long as there was some user. There was for some time a doubt as to the circumstances under which one person could acquire a sufficient right to a trade-mark to be entitled to restrain another from infringing it. The right to redress being treated as founded on the defendant's intentional fraud, it was thought that a plaintiff who claimed an injunction against a defendant ought to show that he (the plaintiff) had acquired for the mark indicating his manufacture such a reputation as would raise a presumption that the defendant, in adopting a similar mark, had done so with the intention of availing himself of that reputation to divert to himself the plaintiff's custom; or, at all events, that the plaintiff ought to show that he had used the mark long enough to render it probable that such a reputation had been acquired." *Sebastian on Trade-Marks* 9.

Lord Westbury, in *McAndrews v. Bassett*, 4 De G. J. & S. 380, said: "But when it came to be recognized that there was a right of property in a trade-mark, intentional fraud being unnecessary to justify restraint, it was at once seen that, as was stated by Sir J. Romilly, M. R., 'the interference of a court of equity could not depend on the length of time the manufacturers had used it' (*Hall v. Barrows*, 32 L. J. Ch. 548), but that 'from the time of their commencing the user of their trade-mark, they became entitled to the protection of the court against any other persons using the same, so that purchasers might be induced to purchase the goods of other persons as theirs.'" See also *Orr-Ewing v. Grant*, 2 Hyde 185.

"The question as to what constitutes a sufficient length of user to give the plaintiff an exclusive right to a trade name or designation not registered under the act, may be resolved by reference to a judgment in *Hall v. Barrows*, 32 L. J. Rep. 551, in which a decided opinion was expressed that the interference of a court of equity does not depend on the length of time the name has been used, and that, although it might not have been adopted a week, and might not have acquired any reputation in the market, still the right to use it would be protected." Slater on Trade-Marks 238.

In *Hall v. Barrows*, 32 L. J. Ch. 548, the Master of Rolls said: "It has sometimes been supposed that a manufacturer can only acquire such a property in a trade-mark as will enable him to maintain an injunction against the piracy of it by others, by means of a long use of it, or, at least, such a use of it as is sufficient to give it a reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of this view of the case. The interference of a court of equity cannot depend on the length of time a manufacturer has user of it. If the mark or brand be an old one, formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such a property in it, or prevent others from using it; but provided it has been originally adopted by a manufacturer, and continuously and still used by him to denote his own goods when brought into the market and offered for sale, then I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbor cannot use that mark. Were it otherwise, and were the question to depend entirely upon the time the mark had been used or the reputation of it had been acquired, a very difficult, if not insoluble inquiry would have to be opened in every case; namely, whether the mark had acquired in the market a distinctive character denoting the goods of the person who first used it."

In *Cope v. Evans*, L. R., 18 Eq. 143, Sir Charles Hall, V. C., said: "The plaintiffs, from the time of their commencing the user of their trade-mark, became entitled to the protection of this court against any other persons using the same, so as that purchasers might be induced to purchase the goods of other persons as the plaintiff's goods. And it

is not an answer to an application for an injunction to restrain the user thereof by another person, for such other person to say and prove that he adopted the trade-mark without knowing that it already belonged to the plaintiff."

In *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125, Breese, J., said: "It is the actual use of the trade-mark affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property." Citing *Upton on Trade-Marks* 179.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., *dissenting*, said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture, of a symbol or device, not in actual use, to designate articles of the same kind or class, . . . and the rule being that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agent. Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use."

In *Blackwell v. Dibrell*, 3 Hughes (U. S.) 151, the court said: "On the contrary, it is distinctly laid down by the authorities that it is only the actual use of the mark, device or symbol, by the dealer which entitles him to it, and gives him the right to be protected in the enjoyment of it."

In *Shaver v. Shaver*, 54 Iowa 208; 37 Am. Rep. 194, Beck, J., said: "The exclusive right in a trade-mark is acquired by its use, which the law does not require shall be continued for any prescribed time."

In *Royal Baking Powder Co. v. Sherrill*, 59 How. Pr. (N. Y. Supreme Ct.) 17, Van Horst, J., said: "In such a case the word itself becomes property, to the extent above indicated, to the one who first distinctly appropriates it to his use. . . . Prior in time, prior in right."

In *Schneider v. Williams*, 44 Pat. Off. Gaz. 1400, it is said: "Actual use of a mark upon goods put on the market and sold by the adopter is necessary to create ownership. Three things are necessary:

"*First*.—Adoption of a mark not used by another to designate goods of the same kind on market.

"*Second*.—Application of a mark to an article of traffic.

sells his goods in the open market in the regular course of trade, at that instant his title becomes complete and established, and, while subsequent use is necessary to maintain it, still no amount of subsequent use or reputation which the mark may acquire can increase his rights or give him any better standing in a court of equity than his original adoption and use. We cannot see any good reason why this rule should not be followed, as it is the most simple and easy of application, simplifying the evidence and lightening the burdens of the court, without danger to the accomplishment of substantial justice.¹

"Third. — Article bearing trade-mark must be put on market by owner."

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, the court said: "The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it and of the defendant's unlawful use thereof. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69. If the absolute right belonged to the plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred and . . . the further violation of the right of property would nevertheless be restrained. *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514."

In *Whitfield v. Loveless*, 64 Pat. Off. Gaz., p. 442, the court said: "The court finds, then, that the word 'Columbia,' is a fanciful name; that the person first selecting it is entitled to its use, for the reason that by its selection and exclusive use no monopoly is created, and on the further broad legal ground that that which is prior in time is first in right."

"What time is required for the perfection of title? That is, how long does it take to adopt it? The answer is obviously this: the moment one who has selected a symbol to indicate his merchandise applies the mark to his goods, the act is complete. The avowal of his intention to adopt, his registration of the mark, and notice to the whole world, do not constitute adoption; but apply the mark to the articles for sale, and, *eo instanti*, the act is complete. In *McAndrew v. Bassett*, the right of the plaintiff was disputed because of his recent appropriation of the symbol to stamp his licorice, just as a claim based upon mere prescription might be challenged. The lord chancellor said, that he had been much pressed by the defendants' counsel to declare that there was not sufficient time, between the termination of the month of July and the

15th of September following, for the plaintiff to acquire a right of property in the particular trade-mark. The substance of the argument of defendants is this: that, supposing the court interfere upon the ground of property in a trade-mark, that property must be regarded as the offspring of such an antecedent user as will be sufficient to have acquired, for the article stamped, general notoriety and reputation in the market; and that the property cannot be held to exist until the facts of such user, notoriety, and public reputation have been proved. The plaintiff won." *Browne on Trade-Marks* 58-59.

1. In *Kohler Mfg. Co. v. Beeshore*, 53 Fed. Rep. 262, Butler, J., said: "The plaintiff claims ownership of a common-law trade-mark in the words 'One Night Cough Cure,' used as a label on medicine, which it manufactures. Granting that a trade-mark may be acquired in this collocation of words, the plaintiff, to sustain its claim, must show that the words have been used in the connection stated, so uniformly and so long as to have become familiar to the public as a sign of this article of its manufacture. To show merely an adoption of the words, without such continuous use and public familiarity and understanding, would amount to nothing. The use, even for a brief period, in connection with occasional sales, would amount to little if anything more. To establish a proprietary right in the language, it is necessary that the public understanding respecting the purpose of its use shall be fully proved. . . . There is no sufficient evidence that the plaintiff had acquired a trade-mark. . . . The occasional use of the written label prior to the fall of 1891 was unimportant. It was insufficient to make any public impression; and the period between the fall of 1891 and February following, when suit was

commenced, was too short, in the most favorable view of the evidence, to have established or fixed the label (whatever it was) in the public mind as a known sign or indicia of the plaintiff's manufacture of cough medicine." This judgment was affirmed on appeal, Shiras, J., saying: "Complaint is also made of the court below in holding that there was no sufficient evidence that the plaintiff had acquired a trade-mark in the collocation of words stated. It may be, as is argued by complainant's counsel, that the interference of a court of equity does not depend on the length of time the name has been used, and that the rule is that he who first adopts a trade-mark, acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied. Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514. Nor will a court of equity recognize by injunction a proprietary right in a phrase or name, unless it has been used in such circumstances as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572. *Cited in Richter v. Reynolds*, 59 Fed. Rep. 577.

See *Richter v. Reynolds*, 59 Fed. Rep. 577, where the opinion by Dallas, J., deals with the character of the use which is requisite to the acquisition of title to a trade-mark, and also with the effect of the registry of one device upon a claim made by the same person to a different device as a common-law trade-mark for use upon the same kind of goods.

In *Colgan v. Danheiser*, 35 Fed. Rep. 150, no relief was granted, it not appearing that complainants had first established a reputation for their device before defendants simulated it. See also *Robinson v. Berry*, 50 Md. 599.

In *U. S. v. Steffens*, 100 U. S. 82, Miller, J., said: "The trade-mark recognized by the common law is generally the growth of a considerable period of use rather than sudden invention. . . . The exclusive right grows out of use and not from mere adoption."

In *Wheeler v. Johnston*, L. R., 3 Ir. 284, the vice chancellor said: "But in-

dependently of the operation of the statute, it is necessary for me to consider, in this case, how the right of a trade-mark may be acquired. In the first place, it is not necessary that it should be used for any definite length of time; there is no statute of prescription applying to trade-marks; and all that is necessary is that the article shall be placed in the market in connection with the desired trade-mark, and that it shall be known in the market for a sufficient time to lead the public dealing in that article to connect the trade-mark with that particular article. If goods so marked and known have acquired a reputation which leads people to ask for such goods so marked, that is sufficient to entitle the vendor or producer to complain of any infringement."

In *Seltzer v. Powell*, 8 Phila. (Pa.) 296, Leg. Int. 308, Paxson, J., said: "Where, as here, a party claims to have recently adopted a trade-mark, composed in part of certain words which do not in themselves designate the origin or ownership of the merchandise, and which trade-mark has not been used to a sufficient extent, or for a long enough period to be known to the trade, and another party shortly thereafter, in entire ignorance of the fact of its existence, uses the same words as part of his trade-mark, without there being any other imitation, or any apparent design to sell his goods as and for the goods of the party who claims to have first adopted it, a court of equity will not interfere in a summary way by injunction, but will remit the parties to a court of law, there to settle the question of the original appropriation of the trade-mark by the verdict of a jury."

In *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115, Giles, J., said: "A purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation and subsequent use, become a trade-mark. . . . The same might be said of a symbol or sign, such as a cross, a star, or lion, which, when stamped upon a particular article, may become its distinctive mark, and will be upheld as such so soon as the article becomes known and distinguished by that mark."

In *Edelsten v. Vick*, 11 Hare 78, the Vice Chancellor said: "It was contended that the plaintiffs were not the patentees, and that they had no

One important element in the acquisition of title is that the mark appropriated shall be such a one as is legally unobjectionable and is susceptible of exclusive appropriation, for unless the mark can become the exclusive property of the adopter and user, it cannot be a valid trade-mark.¹

3. Class of Merchandise.—Elsewhere in this article it is stated that the basis of trade-mark protection is the right which an honest and skillful dealer has in his good reputation.

The recognition of this right has led to the recognition of a property right in a trade-mark, when applied to goods made or sold by the owner of the mark.

The courts have gone even further than this; they have held that the honest dealer who has created a good and valuable reputation for his goods and consequently for himself, is entitled to all the benefit which he can in any legitimate way derive from that good reputation. The application of this rule has led the courts to hold that where a manufacturer is making and selling one or several varieties of goods, all belonging to the same class, and all within his particular line of business, and has applied to these goods a trade-mark indicating their ownership and origin, he has such a right in the trade-mark, as representing his good reputation, as will entitle him to enjoin the use of the same upon goods not made by him, but belonging to the same class of merchandise. This rule is based upon the clearly reasonable and equitable ground, that the public cannot know how many varieties of goods belonging to the same class the owner of the trade-mark makes and sells under the mark, and when they see any one or more of the general class of goods bearing the mark, which they know as the mark of the man with whom they have been in the habit of dealing, they will at once conclude that the goods are of his manufacture, and if this is not the case they will be deceived thereby, and the owner of the mark exposed to danger of injury, because he cannot control the quality of the

title to the label; but it is not the patent, but the continuous use of the label for a certain period of time, which confers the right to protection; and the length of time during which this use by the plaintiffs and those to whose rights they have succeeded existed, is a sufficient title."

In *Purser v. Brain*, 17 L. J. Ch. (U. S.) 141, the Vice Chancellor said: "Then the question arises, whether the court can say certainly that the user of the plaintiff's patent is so clear that the injunction ought to be continued. Upon this point, I feel that it is very possible a jury may think there has not been so long a user by the plaintiff of his title as to enable him to sustain an action at law."

In *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, Shipman, J., said: "It is also to be noticed, that an assignee of a trade-mark does not obtain a right to restrain copyists of his mark, merely by virtue of his assignment, but he must also show that it has actually been used and applied upon an article, so that the public have come to understand that the article to which it is attached is the manufacture or production which is generally known in market under that denomination." *Walton v. Crowley*, 3 Blatchf. (U. S.) 440."

1. *New York, etc., Cement Co. v. Coplay Cement Co.*, 44 Fed. Rep. 277. See *supra*, this title, *Geographical Terms*, where the question is discussed.

goods not made by him and thus sold under his trade-mark. There is still another excellent reason for the rule; if a second manufacturer were to adopt and use the mark of another, within the same class of merchandise, he would, by so doing, acquire exclusive rights to the mark as applied to his particular variety of goods, and if the first user of the mark should subsequently desire to add that particular variety of goods to his general line within the class, he would find himself in the position of being unable to employ his own trade-mark, which is equivalent to his own name, upon his own goods; he would thus be deprived of a very important part of his own valuable reputation, and seriously injured. These consequences are obviated by extending the rights of a trade-mark owner to the whole class of merchandise, within reasonable limits. What the limits of the class will be, will in every case be a question for judicial determination.¹

1. See *supra*, this title, *Doctrine of Origin and Ownership*. "The commissioner of patents shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm, or corporation, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons, or which is identical with a trade-mark appropriate to the same class of merchandise and belonging to a different owner, and already registered or received for registration, or which so nearly resembles such last mentioned trade-mark as to be likely to deceive the public. But this section shall not prevent the registry of any lawful trade-mark rightfully in use on the eighth day of July, eighteen hundred and seventy." *United States Rev. Stat.*, § 4939.

In *White Co. v. Miller*, 50 Fed. Rep. 277, plaintiffs were the users of "Miller's Chicken Cock Whisky," as a trade-mark for "straight" whisky in barrels, and defendants began the use of "Miller's Game Cock Rye" on barrels and bottles for "blended" whisky. At the suit, defendants contended that the difference in application justified the similarity. Colt, C. J., said: "But it surely cannot be said, that a person having a valid trade-mark, which he uses upon one form of package, another person can adopt the same mark upon the same form of package, and is justified in its use because he also puts it upon another form of package. Nor is it very material whether the barrels have one or two stamps upon them, or

whether one kind of whisky is straight and the other blended, or the price of one is a little greater or less than the other."

Complainants, whose trade-mark for canned salmon was "Epicure," sued to restrain defendants, who had previously used the same mark for canned fruit, from extending it to salmon. Coxe, D. J., said: "The reasoning of some of the authorities would indicate that the defendants had a right to use the brand in connection with other fruits and vegetables, analogous to tomatoes and peaches; but to assert that they have the right to use it on all canned goods is carrying the doctrine far beyond any reported case. . . . The fact that the defendants have subsequently extended their business so as to include fish and other like articles of food, does not avail them, neither would the fact, if it existed, that, at the time they adopted the word 'Epicure' they intended in the future to embrace these articles. . . . It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it." *George v. Smith*, 52 Fed. Rep. 830.

Plaintiffs, whose trade-mark for condensed milk was "Milk-Maid," sued to restrain defendant from using the same mark for similar articles. The court determined that the registration of the defendant's trade-mark must be confined to substances other than condensed milk, coffee and milk, cocoa and milk, chocolate and milk, and essence of coffee; allowing it for butter,

butterine, and eggs. *Anglo Swiss Condensed Milk Co. v. Metcalf*, 31 Ch. Div. 454.

In *Edwards v. Dennis*, 30 Ch. Div. 454, Cotton, L. J., said: "Now, what was done in the present case? There was a registration by Mr. Edwards' predecessors in title for Class 5, 'unwrought and partly-wrought metals used in manufacture.' That was registration in respect of all goods which come under Class 5, a class which includes a vast number of things. It is not exhaustive in its terms; it only gives examples of the articles included in it, for it says 'such as' iron and steel, iron rough, iron rails, iron sheets, and so forth. The registration in the present case has been for the entirety of that class. In my opinion that is wrong. . . . In my opinion it is not the intention of the act (1875) that a man registering a trade-mark for the entire class, and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in that class. . . . The vice chancellor allowed the registration to stand for all the goods in Class 5 except iron wire; but I think the proper course is to let it stand for unwrought and partly-wrought metals consisting of galvanized iron sheeting. This would show what are the goods in respect of which he claims to use his trade-mark." And he further says: "Now it appears that the real defendants, Messrs. Felten and Guillaume, have been carrying on business for many years, and are and have been confining themselves to the manufacture and sale of wire. On the other hand, the plaintiff is and has been selling only sheet iron. Can it be said that by placing this label or mark of which the plaintiff claims on their bundles of wire, the defendants are passing off their goods as those of the plaintiff, when the plaintiff is not selling that class of goods at all? If they had been using it as a trade-mark upon the same description of goods as those manufactured by the plaintiff, that might have led people to believe that those goods were the plaintiff's manufacture; but when we find that the goods are so distinct as they are in this case, I should say, as a judge of fact, that the defendants are not doing anything to mislead people into thinking that their goods are the goods of the plaintiff. . . . In the course of the argument it was asked, what is to be done if a

man extends his business? . . . In my opinion, if a man wishes to extend his business to a new description of goods and to use his trade-mark in connection with the goods, he ought to register it in respect of those goods."

In *Collins Co. v. Oliver Ames Co.*, 20 Blatchf. (U. S.) 542, Blatchford, J., said: "The complaint in this suit alleges that the plaintiff corporation has, from its organization, been engaged in making 'axes, hatchets . . . ' that it has always used as its trade-mark the name of 'Collins & Co.' but has placed and now places that name upon such goods only as have obtained a high standard of excellence; that said trade-mark name was intended to, and did inform purchasers that the goods upon which it appeared were of the manufacture of the plaintiff exclusively. . . . Clearly, those who purchased shovels made by Ames & Sons, and stamped 'Collins & Co.' would believe that such shovels were made by the plaintiff, for there was no other Collins & Co. than the plaintiff. This was an unlawful appropriation of the plaintiff's trade-mark. . . . It is strongly urged, on the part of the defendant, that a mark or stamp, to be a trade-mark, must be the mark of an existing trade; that the mark 'Collins & Co.' on shovels, when adopted by Ames & Sons, became the mark of a trade in shovels, carried on by Ames & Sons; that the plaintiff had no trade in shovels at the time; that the mark 'Collins & Co.' thus became the mark of Ames & Sons' trade in shovels, and the property of Ames & Sons in respect to shovels made by them, by prior right; that any use of that mark on shovels afterwards, by the plaintiff, became wrongful as against Ames & Sons or the defendant; and that the plaintiff has no right in the premises which it can enforce against the defendant. This view is specious, but unsound. The plaintiff having, from 1843, the right to make any article of iron, steel, or other metal, and having gone on, from that time, both before and after 1856, extending its manufacture beyond edge tools into digging tools, such as picks and hoes, and having always put the mark 'Collins & Co.' on its best quality of articles, the fact that it did not before 1856 make a digging tool, such as the shovels on which, in 1856, Ames & Sons put the mark 'Collins & Co.' does not warrant the conclusion that that mark

was not, in 1856, the mark of the plaintiff's trade in respect to such shovels."

In *Carroll v. Ertheiler*, 1 Fed. Rep. 688; 21 Alb. L. J. 503, the application of the words "Lone Jack," the plaintiff's trade-mark for smoking tobacco, to cigarettes, by the defendant, was held to be an infringement; there not being sufficient difference between the two kinds of goods to warrant such use. Butler, J., said: "While the revenue laws, for purposes of taxation, distinguished between smoking tobacco and cigarettes, there is, we believe, no substantial difference. Cigarettes consist of smoking tobacco, similar in all material respects to that used in pipes. The circumstance that a longer 'cut' than that commonly used in pipes is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose, and is all embraced in the term 'smoking tobacco.' We do not believe the public or the trade draw such a distinction as the defendant sets up. . . . The denominating characteristic of the plaintiff's trade-mark is the name 'Lone Jack.' His tobacco has come to be known and described by this name, throughout the country, to such an extent that the accompanying device has ceased to be important, if it ever was so, doubtless rarely observed, and slightly remembered. At home and abroad, to the trade and the public, it is familiarly known as 'Lone Jack,' and is thus designated as the plaintiff's manufacture by purchasers and sellers. The defendant's application of this name to his smoking tobacco is an adoption and use of the essential part of the plaintiff's trade-mark."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 57, Clifford, J., said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device not in actual use to designate articles of the same kind or class . . . the rule being, that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agents. Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use; nor does the right to protection extend beyond the actual use of the

device. Hence, the use of it on one particular article of manufacture or merchandise will not prevent another from using it on another and different class of articles, the rule being strictly applied that the right to protection in equity is limited to the prior use of the symbol by the owner."

There being four trade-marks, each consisting of the device of an anchor, registered for different varieties of goods in the same general class, the court refused the application to register a fifth for still another kind of goods in the same general class, in the case of *In re Hargraves' Trade-Mark*, 11 Ch. Div. 669.

In *Sorg v. Welsh*, 16 Pat. Off. Gaz. 910; 38 P. & S., Am. Trade-Mark Cases, Doolittle, Acting Commissioner, said: "Applicants are not compelled to register a trade-mark upon a whole class of goods, but may restrict it to a particular description of goods within that class. The law requires, in fact, that an applicant shall state the particular description of goods comprised in the class to which he applies, or intends to apply, his trade-mark. Different persons may apply the same mark to different sorts of goods in the same class, provided the nature and resemblance of the goods are not so nearly the same as that the identity of the trade-mark would deceive the public as to their origin or ownership."

In *Re Jelley*, 51 L. J. Ch. 639, the application of petitioners, who had been using a certain trade-mark for several kinds of iron, to register it for the whole class of iron, was refused. Jessel, M. R., said: "Although the applicants contend that they have used this mark for twenty-five years in the market, these particular goods have not been known by it. That point was argued by a man who had used a mark for whisky which he thought he could extend to beer, though it was very like Allsopp's mark, but I did not think so. . . . The applicants say that, if they are allowed to use this mark in respect to certain goods, it is hard upon them that they should not be allowed to use it for the whole of their trade; but if they are going to sell goods which they never sold before, the answer is that they can adopt a new mark upon them."

In *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535, where defendant sold shirts of "Wamyesta Muslin," it was held an infringement of plaintiffs' trade-

mark "Wamsutta" for muslin. Thayer, P. J., said: "As to the point made by the defendants, that the plaintiffs are manufacturers of muslins and the defendants are manufacturers of shirts, and therefore the plaintiffs cannot complain of the use of their trade-mark, or a servile imitation of it by defendants when affixed to their shirts, we do not see the force of such reasoning. It is too plain to require any demonstration that if the defendants manufacture shirts of muslin greatly inferior in quality to the plaintiffs' muslin, and pass them off upon the public as shirts made of the plaintiffs' muslin, the plaintiffs may suffer greatly thereby in their reputation as manufacturers, and consequently in their sales of the muslin which they manufacture."

In *Colman v. Crump*, 70 N. Y. 573, Allen, J., said: "It is an infraction of that right, to print or manufacture, or put on the market for sale, and sell for use upon articles of merchandise of the same kind as those upon which it is used by the proprietor, any device or symbol, which by its resemblance to the established trade-mark will be liable to deceive the public, and lead to the purchase and use of that which is not the manufacture of the proprietor, believing it to be his. . . . The fact that the same device is used upon other articles of merchandise does not take from the plaintiffs their right to its exclusive use on this one article of their manufacture."

In *La Société Anonyme des Mines v. Baxter*, 14 Blatchf. (U. S.) 261, Blatchford, J., said: "The fact that the defendants sell a paint composed of a white oxide of zinc ground in oil, and represent it as containing white oxide of zinc made by the plaintiffs, when it does not contain white oxide of zinc made by the plaintiffs, is no violation of any trade-mark of the plaintiffs. . . . So, flour is intended to be made into bread. But, if a baker should falsely stamp his bread with the mark of a particular brand of flour, the maker of such brand, if having a trade-mark therefor, could not claim that the baker had violated his trade-mark. And so of any other raw material which enters as an ingredient into a compound or article of manufacture."

In *Re Bush*, 10 Pat. Off. Gaz. 164, Duell, Commissioner, said: "Bush & Co. sought to register 'Centennial' as a trade-mark for 'Sparkling Wines,' but

were rejected upon the registration of F. Boehm & Co., of said word for 'wines of which alcoholic spirits is an ingredient.' It is denied, however, by the applicants that the word 'Centennial,' as registered by Frank Boehm & Co., covers the class of merchandise to which they claim the right to apply it, *i. e.*, Sparkling Wines, but is confined to those wines of which alcoholic spirits is an ingredient. Frank Boehm & Co. set forth that their trade-mark is applied to that class of merchandise containing alcoholic spirits, and they include wines in the enumeration of the particular goods comprising such class. All wines contain alcohol, and as they have not expressly limited themselves to such as are compounded with alcoholic spirits, it seems not inconsistent with their registration to say that they really include all such wines as contain alcohol."

In *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y. Supreme Ct.) 299, Barrett, J., said: "It is not disputed that, so far as the word 'Amoskeag' has been applied by plaintiff to cotton goods actually manufactured and sold by it, the use of such word is its exclusive right. The claim is that, as to any description of cotton goods which the plaintiff has not yet produced, the word 'Amoskeag' is common property and that, therefore, the defendants were at liberty to apply it as their trade-mark, even as against the plaintiff, to prints or calicoes. This claim rests upon the assumption that the word 'Amoskeag' is simply the plaintiff's trade name, that is, a geographical name in which the plaintiff can have no exclusive property, except so far as it has been actually applied. It ignores the fact that the word stands for, and is, in reality, the distinctive part of the plaintiff's corporate name. If the plaintiff had been incorporated, say as 'The Manchester Manufacturing Company,' and had used the word 'Amoskeag,' merely to distinguish its goods, the question whether there could be any property in the name, except as to those classes of goods to which it had actually been applied, would have been presented for consideration. It would then have been similar to the 'I X L' case, where the question was decided in the negative by the examiner in the English Patent Office, but whether correctly or not remains to be judicially determined. The courts have gone no

farther than to say that the property in such marks does not extend to an entirely different line of industry; as if a person does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linens, another person may stamp a lion on iron. *Ainsworth v. Walmsley and Hall v. Burrows*. But when it is considered that the word 'Amoskeag' stamped upon the plaintiff's goods is nothing more or less than an abbreviation, like 'A. M. Co.,' or 'A. M. C.,' of 'The Amoskeag Manufacturing Company,' a very different question, which is the only one really in the case, is up for judgment. The plaintiff's corporate name was lawfully given to it by legislative action over forty years ago, and there would seem to be no good reason why it should not receive as much protection against the unauthorized use of its name as a natural person. . . . Now, it will scarcely be pretended that the defendants have the right to call their prints 'The Amoskeag Manufacturing Company Prints.' And why not? Is it because the plaintiff has acquired a special and limited property in its own name, by its application to certain articles? Assuredly not. The right is denied, not merely upon the narrow ground of the violation of an ordinary trade-mark, but upon the broad principle that the plaintiff is entitled, under such circumstances, to protection against the unauthorized use of its name. Such a use is conclusive evidence of the wrong which the law undertakes to redress, viz.: 'The sale of the goods of one person as being those of another.' *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. Now, if the defendants have not the right to use the plaintiff's name directly, they certainly have not the right to use it indirectly. For instance, in view of the evidence in this case, the defendants could no more rightfully call their prints 'A. M. Co. prints,' than they could style them 'The Amoskeag Manufacturing Company Prints,' because that would still be a representation, less full, pointed and direct, but none the less fraudulent, that the prints were of the plaintiff's production. 'A. M. Co.' is not merely a trade-mark, but a well-known, long used and thoroughly understood abbreviation of the plaintiff's name. So with the word 'Amoskeag.' It brings before the mind of the dealer in cotton goods, not a mere geographical designation, but 'The Amoskeag Manufacturing Company.'

He sees the full name of the company the moment his eye rests upon the distinctive part of it. To stamp the word 'Amoskeag,' therefore, upon cotton goods is substantially to represent, (and that whether such be the intention or not, which is immaterial in applying the remedy [*Millington v. Fox*, 3 Myl. & Co. 338]). that such goods are manufactured by the Amoskeag Manufacturing Company. It was contended that the plaintiff's claim was practically of a monopoly in the word 'Amoskeag.' But not so. The word is free to those engaged in other and distinct lines of industry, because there its use conveys no such meaning as when applied to cotton goods. . . . The manufacturer of cement, for instance, might apply the word 'Amoskeag' to that article, because when stamped upon cement it would not stand for 'The Amoskeag Manufacturing Company.' In that connection it would be a mere geographical designation and not, in effect, the plaintiff's name. . . . Applied, however, to any and every variety of cotton goods, whether such as the plaintiff has or has not, as yet, manufactured, it could not fail to indicate the plaintiff's name, and that the goods were of its manufacture. . . . The only difference between the parties on this head, is as to the legal treatment of the word 'Amoskeag.' . . . But now suppose that the plaintiff had received from the legislature of *New Hampshire* the name of 'The Amoskeag Baking Company,' and for forty years had been engaged in the humbler, though hardly less useful, avocation of 'manufacturing' almost every variety of bread, roll, muffin, cracker, biscuit, cake and pie, on which articles of food it had invariably stamped its corporate name or some abbreviation thereof, such as 'Amoskeag B. Co.,' or 'Am. Baking Co.,' or 'Am. B. Co.,' or 'Amoskeag.' Suppose, however, that the plaintiff had omitted or had not yet decided to make and vend the single variety known as 'crumpets,' and thereupon a rival baker attempted to sell his crumpets as 'Amoskeag crumpets,' would not any customer, upon seeing the name thus applied, naturally say that the Amoskeag Baking Company had added crumpets to its other varieties of bread? And would not the rival bakery be restrained, upon the plain principle of an unauthorized use of the company's name? The parallel is not

precise, as the printing of calicoes may require some additional machinery. But the difference is only in degree." *Compare Amoskeag Mfg. Co. v. Garner*, 55 Barb. (N. Y.) 151.

In *Smith v. Reynolds*, 13 Blatchf. (U. S.) 458, Shipman, J., said: "The question . . . is, does the registration of a trade-mark for 'paints,' by a plaintiff who had previously acquired the exclusive use of such mark for particular kinds of paints only, enable the plaintiff to restrain the defendant from its use upon another kind of paints, to which kind he had been in the habit of affixing the same mark prior to the registration? . . . By registering this mark in the patent office, and appropriating it to all paints, they cannot, in my opinion, prevent the defendants from the use of the mark upon a class of goods to which they had applied the mark prior to the registration, especially as the plaintiffs have not, since the registration, extended actual use of their mark to that class."

In *Ex p. Boehm*, 8 Pat. Off. Gaz. 319, an application to register a trade-mark for the whole class of "alcoholic spirits" was allowed. Spear, Acting Commissioner, said: "I know of no decision of the courts, nor does the examiner cite any in support of his position, that the law contemplates that different descriptions of the same class of goods should be made the subjects of separate applications. On the contrary, the most recently published decision which has come to my notice, gives the clause of the statute under consideration (section 4937 *United States R. S.*) quite a different interpretation. *Smith v. Reynolds*, 3 Pat. Off. Gaz. 214. . . . It is true that the use of such comprehensive terms is a very bad practice, but the evil results appear to fall on those applicants alone who take the risk. . . . This danger of including within the terms of a registration more than applicants can maintain, will probably serve to restrict the practice of making the descriptions too comprehensive."

In *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 441, Jessel, M. R.: "Now, as to this class, it is quite immaterial that the maker of the goods to which, what I will call for the sake of shortness the trade-mark, is affixed, did not know that it was a trade-mark, and had not the slightest intention of defrauding anybody. He must not put as a mark on goods, even though he intends to

establish it as his own trade-mark, that which is the known trade mark of other people, and he would be restrained by injunction, though he thought he himself had invented the trade-mark, and *bona fide* intended it to designate goods of his own manufacture. And the reason is obvious, because the goods pass from hand to hand, and though he may act with the utmost *bona fides*, yet the ultimate purchasers might believe that they were the real goods, that is to say, that they were manufactured by the person entitled to the original trade-mark. . . . Consequently, whenever you get to a case of the first class, you have nothing more to do than to show that the trade-mark has been taken. What do we mean by saying that the trade-mark has been taken? . . . What the court has to satisfy itself of is, that there has been an essential portion of the trade-mark used to designate goods of a similar description. I say of a similar description, because there is no right in a trade-mark except to protect the manufacturer of the goods. If a seller of carriages invented this fanciful mark, this curious animal (above referred to as anything entirely arbitrary), and put it on carriages, that would not prevent a manufacturer of woolen goods from putting it as a trade-mark on woolen goods. As I said before, you must have regard, not merely to the mark, but to the nature of the goods upon which the mark is impressed."

In *Singer Mfg. Co. v. Kimball*, Ct. of Session Cases, 3d Series XI. 267; 10 Scott L. Rep. 173, it was said: "Now, in the Scotch court, the judges seem certainly to have proceeded upon a general principle, founded upon some expression of Lord Westbury in *Wotherspoon v. Currie*, L. R., 5 H. L. 508, that there is a property acquired in a trade-mark or trade name to this extent, that no one else is entitled to use that mark or name at all as applied to the particular article in connection with which it has been used, even though he does it perfectly honestly and in a way not calculated to deceive; that the man who first used the name is entitled to say, 'You shall not use the name at all applied to goods like mine, it will do me harm if you use it in that way and you shall not use it at all.'"

In *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 310, Blatchford, J., said: "In-

4. **Affixation.**—A trade-mark, in order that it may indicate the origin and ownership of goods, must be affixed to the goods themselves. The use of the mark on advertising matter alone does not create a title.¹

asmuch, therefore, as the defendant is not shown to have used the word 'heliotype,' in connection with prints which are substantially the same description of goods as the prints which the plaintiffs designate as 'heliotype,' or with prints which have substantially the same descriptive properties and qualities as those which the filed statement refers to as the prints which the plaintiffs designate as 'heliotype,' the plaintiffs are not entitled to the relief asked, by reason of any right acquired under the statutory registration set forth in the bill. . . . It is apparent, that the protection given by the statute is to the exclusive use of the trade-mark only so far as regards the particular description of goods set forth in the filed statement, as the particular description of goods to or by which the trade-mark has been . . . appropriated; that the inhibition of the statute is only against the use of substantially the same trade-mark or substantially the same particular description of goods; and that the wrongful use which may be enjoined is only the affixing, by another, of substantially the same trade-mark to goods of substantially the same descriptive properties and qualities as those set forth in the filed statement as the particular description of goods by which the trade-mark has been, or is intended to be, appropriated."

In Delaware, etc., *Canal Co. v. Clark*, 13 Wall. (U. S.) 311, Strong, J., said: "The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former."

In *Ainsworth v. Walmsley*, 35 L. J. Ch. 352; L. R., 1 Eq. 518, Wood, V. C., said: "This court has taken upon itself to protect a man in the use of a trade-mark, as applied to a particular description of article. He has no property in that mark *per se*, any more than any person has in any fanciful denomination which he may assume for

his own particular use without reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a peculiar species of goods, and when he has caused his goods to circulate with that mark, when that mark has become the known indicium of their being his, the court has said that nobody shall defraud him by using that mark, and passing off the goods of another's manufacture as being the goods of the owner of the trade-mark."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 538, Lord Kingston said: "A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself; and if such symbol or emblem comes to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description."

1. "Mode of Application or Use of Mark.—This may be set forth thus: 'by marking each article with blue ink by means of a stencil plate;' 'by printing the mark upon tags to be fixed to the cloth;' 'by branding the top of each box containing the goods with a hot iron;' 'by painting or stenciling the mark upon each article;' or in any other language which will clearly show the mode of affixing the same. Sometimes the articles to be protected are too minute to bear the mark, as needles, when the box will perform that office; or pins, when the paper in which they are fastened will serve the purpose; and so of a myriad of those articles to which the emblem cannot be affixed, except by means of envelopes, wrappers, boxes, and other inclosures." Browne on Trade-Marks, § 305.

In *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494, *affirming* 40 Ill. App. 430, Bailey, J., said: "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity. Browne on Trade-Marks, section 91. There is no evidence, or, if there is any, it is exceedingly

slight, that the words 'Hazelton Boiler' or 'Hazelton' had been actually affixed to said boilers as a trade-mark prior to July 10th, 1884." A bill for relief was dismissed.

In *Jay v. Ladler*, 40 Ch. Div. 649, Kedewich, J., said: "There is one argument which was addressed to me on behalf of the defendant which I must notice in this connection, and that is, that though this trade-mark has been used by the plaintiff, and though it was registered with reference to these trade articles, it has never been affixed to any article, or, at any rate, not proved to have been affixed, and the judgment of Sir George Jessel in *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434, was quoted to me, in which he insisted on the necessity of, in that particular case, affixing or impressing the trade-mark. Now, to my mind, there is some fallacy in quoting those expressions in a case like this. There is no statutory provision, but no doubt the court would consider (I think that follows from the case of *Edwards v. Dennis*, 30 Ch. Div. 454), that the trader is bound to connect in some way the articles sold or sought to be protected with the trade-mark which he has registered, and if ever it occurs that a trader comes into court and says, 'I have registered a trade-mark in respect of certain goods, and I have sold those goods, but I have not sold those goods as the goods of that trade-mark,' he would have, at any rate, some difficulty in maintaining his rights. But here Mr. Jay has proved in the witness box, that, at any rate, as regards this particular class of goods, they are either wrapped up in a brown paper wrapper containing the trade-mark, or put into a box with this trade-mark on it, and if there is a label affixed or put upon them at all, it is a label containing this trade-mark; and I am satisfied that he has sold these things from time to time as goods protected by this trade-mark. Therefore I think that that argument fails."

In *Lorillard v. Pride*, 28 Fed. Rep. 434, Blodgett, J., said: "The use of arbitrary terms, as 'Tin Tag' or 'Wood Tag,' by a manufacturer, to indicate goods produced or sold by him, might be allowable if the person so using the name or words branded them upon his goods, or in any way gave the goods the name."

"Trade-marks, properly so called, consist of some description or device

in some way or other affixed to the article sold, and that description or device may be either affixed to, or impressed upon the goods themselves by means of a stamp, or an adhesive label or ticket, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing them. *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 441." Slater on Copyright and Trade-Marks, page 237.

"Such rights as are analogous to those subsisting in trade-marks, are covered by a similar definition, except that the symbol or sign by which the business or goods is or are identified, is not necessarily affixed to the subject-matter." Slater on Copyright and Trade-Marks, p. 233.

In *Wheeler v. Johnston*, L. R., 3 Ir. 284, the Vice Chancellor said: "It is essential that the trade-mark, the use of which is claimed by any party, shall be connected with the articles of sale; of course not necessarily connected by its own nature with the articles, but connected by the act of the party, as, for instance, placing it as a label on his goods which are sold, or advertising his goods in connection with it."

In *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305, Gantt, P. J., said: "The evidence seems to us greatly to preponderate in favor of the conclusion that the plaintiff was the first manufacturer which used the term 'Bell Treble' in its advertisements to distinguish its work. We are also of opinion that the term itself is a combination of words which was capable of appropriation as a trade-mark. The question which has given us serious trouble is whether the plaintiff, which was, as we think, the first manufacturer which attempted to appropriate the term as a trade-mark, ever did anything effectual for the purpose of such appropriation. We have seen that it was never affixed to any work of the plaintiff. Of course, in some cases, the work of manufacture itself which is to be thus distinguished cannot receive the mark, as would be the case in respect of a powder or liquid which is advertised or offered for sale. But, in such instances, the package or bottle containing the article can receive, and, as far as we are able to see, always has received, the mark in which a property is claimed. The very term employed seems to require that the article distinguished, or which the manufacturer or salesman

seeks to distinguish, as coming within the designated description, should bear the mark which gives it its character. A trade-mark, which is not in some manner put upon or affixed to the article indicated by it, is almost a contradiction in terms. . . . From the best examination we are able to make of the subject, we are led to the conclusion that, so far as an article of merchandise is concerned, it can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to, or stamped, printed, carved, or engraved upon the article, as the same if offered for sale. The purchaser must be told that the particular thing he proposes to buy is of this or that character, by something connected with the thing itself. He must not be referred to some circular or advertisement for this assurance, nor can he receive it from the representations, by word of mouth, of the manufacturer or salesman. . . . We think that a trade-mark must be annexed to the article offered for sale; and that, if not so annexed, the article cannot be said to have a trade-mark. In the case at bar, the pianos of plaintiff had no such symbol affixed, annexed, stamped, or engraved on them as plaintiff claims to belong to it, and it follows that, in our judgment, the plaintiff was not entitled to the injunction for which it prayed."

In *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434, Jessel, M. R., said: "The cases which have come before the courts, may, I think, be conveniently divided into two classes: the first class, which is the more numerous one, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold? It may be, as I said before, description—that is, it may consist of a name or names, or a lengthy description consisting of names with superadded words, and that description may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods. . . . Sometimes you do not find anything put on the goods themselves, the reason often being that the goods are not capable of it; for instance, when there are liquids, upon which of course you cannot put a mark,

and therefore a mark is put on the bottle containing the liquid, or on the cork which is in the bottle and helps to retain the liquid. These are again true trade-marks, whether affixed in the shape of a label on a bottle of liquid, or in the shape of a device on the cork, or in the case of other goods, such as cigars, affixed to the box which contains the cigars or the string which encircles them; they are in some way or other attached to the goods and go along with the goods on sale."

In *Rowly v. Houghton*, 2 Brew. (Pa.) 303, Ludlow, J., said: "No right can be absolute in a name, as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark."

In *Schumacher v. Schwenke*, 36 Pat. Off. Gaz. 457, Bookstaver, J., said: "The plaintiffs claim that the defendants have produced and sold labels bearing the words 'Henry Lee,' in violation of their rights. . . . It is apparent from an inspection of both labels that they are designed to be used by cigar-box makers and the manufacturers of cigars, and that they are valueless for any other purpose and could not be used by or sold to the public generally. Plaintiffs do not seek to stop a cigar dealer or the public from using the name 'Henry Lee,' but ask that they be protected against interference with their trade by rival manufacturers of labels, and claim that labels are an article of merchandise. . . . The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or on which it is impressed, and to give notice who was the producer—in other words, to authenticate the article to which it is affixed, or on which it is impressed, as the product of the owner of the trade-mark, and is a representative of or substitute for the owner's signature. From the nature of the case these labels cannot in any way perform that office. Although this question has not been decided in this country, it was directly passed upon in *France (Annales de la Prop., etc., tome 5, p. 248)*, in the case of *Lalande v. Appel*. In that case the plaintiffs, who were lithographers, complained that the defendants had counterfeited the designs upon tickets or labels intended to be sold to vendors of liquors and cosmetics, to be placed by them upon

5. **Who May Acquire a Trade-Mark.**—Any person, whether manufacturer, selector, seller, shipper, commission merchant, carrier, or trader, may adopt any legal symbol or name as a trade-mark to indicate the origin and ownership of the goods manufactured, selected, sold, carried, or handled by him, and will be protected by equity in the exclusive right to use the same for the purpose of designating the particular class of merchandise handled by him, or the particular business in which he is engaged; but a trade-mark cannot be acquired at common law unless the owner is a maker or selector of an article of traffic which he himself places upon the market and sells as his, using the trade-mark to indicate its origin and ownership, or to indicate a particular business or place of business, or company doing a particular business.¹

flasks or bottles. In deciding the case, the court held that the plaintiff's claim was ill-founded, because the tickets in question were the special objects of their commerce, and therefore could not be regarded as trade-marks; that the trade-mark regulated by the law of the 25th of June, 1857, is the characteristic sign by means of which the public distinguishes the products of commerce or objects of commerce; that the mark itself cannot be an object of commerce; that by the use which a merchant makes of a ticket in applying to a vase containing the product of his manufacture, it is possible that the ticket may become for him a trade-mark, subject to the fulfillment of all legal formalities, for it may be then, as to him, a sign or distinctive seal of his products, without being the very object of his commerce; but as to the plaintiffs, the tickets can be nothing but the special objects of their industry. I therefore conclude that labels such as these cannot be the subject of a trade-mark."

In *Hazleton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 494, Bailey, C. J., said: "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity. *Browne on Trade-Marks*, § 91."

1. It has been frequently held, that dealers in goods, who exercise their skill and fidelity in the selection thereof, are entitled to protection for their trade-marks which indicate this fact, as fully as a manufacturer who makes the goods. A commission merchant who handles the goods of several factories may also acquire a trade-mark to indicate the goods sold by him; a carrier may adopt a trade-mark to indicate his line of transportation, which

symbol, if used by another, would mislead the public in the shipment of goods, and cause them to be carried over a different route from that of the original adopter of the mark, contrary to the intention of the shipper, and to the loss and injury of the trade-mark owner.

A voluntary association of cigar-makers which is not engaged in the business of manufacturing cigars, and as an association has no property in the business, may yet devise and be protected in the use of a trade-mark label to designate the result of their labor. *People v. Fisher*, 50 Hun (N. Y.) 552, following *Strasser v. Moonelis*, 55 N. Y. Super. Ct. 197, *Bradley, J.*, saying: "The fact that their work is not performed under a single employment, but under many different employers, in as many widely separated shops, may go to the value of the mark in its application to the cigars made by them, rather than to the right to its protection as such."

But see *Schneider v. Williams*, 44 N. J. Eq. 391, where a demurrer to a bill was sustained on the ground that it "does not show that the complainants have applied their mark or label to a vendible commodity, of which they are the owners or in which they trade, and that they have put such commodity, marked with their mark, on the market."

See also *Cigar-Makers' Protective Union v. Couhain*, 40 Minn. 243, where the label of the "Cigar-Makers' International Union of America" was held not a valid trade-mark, two justices dissenting.

In *Allen v. McCarthy*, 37 Minn. 349, the court was equally divided on the question. See also *Blöte v. Simon*, 19

Abb. N. Cas. (N. Y.) 88; and *Carson v. Ury*, 39 Fed. Rep. 777, where it was held that although such a label is not a technical trade-mark, yet where special damage is shown and the imitation of it fraudulent, equity will grant relief.

In the late case of *Wener v. Brayton*, 152 Mass. 101, the decision is that such a label is not a trade-mark. So, also, is the still later case of *McVey v. Brendel*, 144 Pa. St. 235. See also *State v. Hagan* (Ind. 1893), 33 N. E. Rep. 223.

The terms "Lamville," "Green Mountain," etc., applied to scythe stones by the manufacturers, do not indicate quality alone, but a certain selection and care in manufacturing. *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896. See also *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359, where it was said that the fact that the owner of a trade-mark for cigars allows boxes of cigars to be labeled with the names of the dealers to whom they are sent, does not amount to deception which invalidates the trade-mark.

A manufacturing company may appropriate a trade-mark. *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217.

Plaintiff painted its cabs yellow, with a peculiar device, and the name "New York Cab Co. Limited." Defendant painted his cabs the same color with a similar device, and used the words "New York Cab, Ltd." *Lawrence, J.*, said: "I do not mean to say that the plaintiff is entitled to any exclusive property in color or in words, but I am clearly of the opinion that it has so far established a trade-mark in the words, and colors, and device, as they are combined and used upon its cabs, as to entitle it to call upon a court of equity for protection against imitations designed to mislead the public and to deprive the plaintiff of its profits." An injunction was granted. *New York Cab Co. v. Mooney*, 15 Abb. N. Cas. (N. Y.) 152.

Semble, that a manufacturer may legally remove the trade-marks from articles made by another manufacturer and purchased by himself, and place his own trade-marks thereon. *Johnson v. Raylton*, 7 Q. B. Div. 438. *Sebastian* says in this connection: "The maker's mark has already performed its function when the goods are sold, and when it is removed from the goods the maker ceases to be responsible for the guaranty implied by its presence on them. The purchaser, by substituting his own mark, undertakes the re-

sponsibility for the quality of the goods, which are in effect selected and guaranteed by him." *Sebastian on Trade-Marks*, p. 130, citing *Hirsch v. Jonas*, 3 Ch. Div. 584.

In *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286, *Fenner, J.*, said: "A corporation is entitled to have its trade-mark, as well as a private individual, and may sue for its infringement," and "the seller is as much entitled to protection in his trade-mark as if he were the manufacturer."

A trade-mark may indicate the bleacher of goods manufactured by another. *In re Sykes' Trade-Marks*, 43 L. T. 626.

A merchant may adopt a trade-mark to designate goods "manufactured for him, and under his direction, and sold by him." *Conrad v. Uhrig Brewing Co.*, 8 Mo. App. 277.

Every manufacturer, and every person for whom goods are manufactured, has a right to distinguish the goods he manufactures or sells, by a peculiar mark or device, that they may be known as his in the market, and he is entitled to protection of the same, irrespective of the fact that similar goods are manufactured or sold by others; and this right extends to a vendor who merely sells, and has no direct relation to the manufacturers. *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427; 49 How. Pr. (N. Y.) 5; *affirmed* in *Godillot v. Harris*, 81 N. Y. 263; 63 P. & S., *Danforth, J.*, saying: "It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached. It may represent to the purchaser the quality of the thing offered for sale, and in that case is of value to any person interested in putting the commodity to which it is applied, upon the market."

In *McLean v. Fleming*, 96 U. S. 245, *Clifford, J.*, said: "In such cases the question is not whether the complainant was the original inventor or proprietor of the article made by him, and on which he puts his trade-mark, nor whether the article made and sold under his trade-mark by the respondent is equal to his own in value or quality; but the court proceeds on the ground that the complainant has a valuable interest in the good-will of his trade or business, and, having adopted a particular label, sign, or trade-mark, indicating to his customers that the article bear-

VI. REGISTRATION OF TRADE-MARKS UNDER UNITED STATES STATUTES—1. In General.—The Acts of Congress of August 14th, 1876, and March 3d, 1881, constitute the national trade-mark law of the *United States*, and under the latter act, provision is made for the registration of trade-marks in the *United States* Patent Office.

The registration of trade-marks under this latter act is limited to such marks as are used in commerce with foreign nations or Indian tribes. No trade-mark used solely in interstate commerce, or in trade within a state, can be registered under it.

The registration of a trade-mark within the provisions of this act, is *prima facie* evidence of ownership, which will be sustained by the courts until overthrown by proof on the part of a defendant.

The protection afforded citizens of the *United States* for their trade-marks, under the common law, by the courts of the *United States*, is ample, hence the national registration law is little used except for the purpose of creating a permanent record of the date of adoption and use of the trade-mark, and to give jurisdiction to the *United States* courts. Section 7 of the act

ing it is made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers, by using such labels, signs, or trade-mark without his knowledge or consent."

A trade-mark may be acquired to indicate that the goods have been selected and approved by one who had a reputation for so doing. *Hirsch v. Jonas*, 3 Ch. Div. 584.

In *Ford v. Foster*, L. R., 7 Ch. 611, note; 27 L. T. N. S. 219; 20 W. R. 311, 818; 41 L. J. Ch. 682, Bacon, V. C., said: "The meaning and use of a trade-mark is that some person dealing in goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it as that no man may imitate his mark, and the legal right goes no further than that."

In *Winsor v. Clyde*; *Stetson v. Winsor*, 9 Phila. (Pa.) 513, it was held that title to property in the name "Key-stone Line," acquired by many years certain exclusive appropriation and use by shippers of merchandise, who did not own, but had the entire management of the vessels employed by them, while in their port, will be protected in equity; *Finletter, J.*, saying: "Prop-

erty in the terms, names, and devices of trade and business has become as well established as property in any other matter or thing."

A trade-mark may be acquired by those who do not manufacture, but simply print cloths manufactured by others. *Amoskeag Mfg. Co. v. Garner*, 55 Barb. (N. Y.) 151; 6 Abb. Pr. N. S. (N. Y.) 265.

An agreement by the proprietor of a hotel to permit another to place the name of the hotel upon his coaches, is a valid contract; and both proprietor and his licensee may claim the protection of the court for any violation of his individual rights by a third person. *Deiz v. Lamb*, 6 Robt. (N. Y.) 535.

In *Walton v. Crowley*, 3 Blatchf. (U. S.) 440, Betts, J., said: "The person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark as the manufacturer himself."

An organization or establishment formed for the purpose of amusement, just as one formed for the purpose of trade, can acquire a trade-mark or trade name, and will be protected in its use; *e. g.*, "Christy's Minstrels." *Christy v. Murphy*, 12 How. Pr. (N. Y. Supreme Ct.) 77.

In *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723, M., made an agreement with S., the lessee of a hotel, by which the former was to transport passengers to and from the hotel of S.

provides that "any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act," etc., shall be liable to an action in "any court having jurisdiction over the person guilty of such wrongful act, and the courts of the *United States* shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy."

This provision gives to the courts of the *United States* jurisdiction of trade-mark controversies arising between citizens of the same state, provided the suit be brought upon a registered trade-mark used on goods intended to be transported to a foreign country or in lawful commerce with an Indian tribe. This jurisdiction is not very valuable, for the reason that when a suit is brought upon the registration, the courts are bound by the terms and limitations of the registration, and have no such latitude as they generally exercise in common-law cases in equity.

There is one important function of the national trade-mark registration law: most of the countries of *Europe*, before they will afford protection to the trade-marks of our citizens, require that they shall be registered under their laws, and in almost every case require that this registration shall be based upon a registration at home.

to the station, and was authorized to put the name of the hotel, the "Revere House," on his coaches, and the caps of his drivers. A similar contract had formerly existed between S. and B., and after its termination B. still continued to use the name of the hotel on his coaches and the caps of his drivers. The court, in holding that an action would lie against B. at the suit of M., said: "The plaintiffs may well claim that they had the exclusive right to use the words 'Revere House' to indicate the fact that they had the patronage of that establishment. . . . The ground of action against the defendants is . . . that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of, the lessee of the Revere House, in violation of the rights of the plaintiffs."

Plaintiffs had agreed with A., the proprietor of a hotel, to pay him for the privilege of using the name of A. and his hotel, on coaches of the plaintiffs used to convey passengers to and from the hotel of A., and on certain badges of plaintiffs' drivers. Defendants began to use the same on their coaches and the badges of their drivers. An injunction was granted. *Stone v. Carlan* (N. Y. Super. Ct.), 13 Monthly L. Rep. 360.

In *Amoskeag Mfg. Co. v. Spear*, 2

Sandf. (N. Y.) 599, Duer, J., said: "Every manufacturer and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them."

In *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281, the court said: "The court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business; and that, having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of the complainant's friends, or customers, or of the patrons of his trade or business, by sailing under his flag without his authority or consent."

The aforesaid case is cited with approval in *Colladay v. Baird* (4 Phila. (Pa.) 139), and the above passage quoted.

The omnibuses of the London Conveyance Company were painted, and their servants clothed, in a particular

In a recent case in the circuit court of appeals of the *United States*, the rule is announced that foreigners have no common-law rights in a trade-mark in the *United States*, by virtue of a use of the trade-mark abroad, and it is intimated very strongly that if foreigners desire to protect their trade-marks in the *United States*, they should do so as provided by the *United States* statute.¹ The right of foreigners to register in the *United States* is the result of treaty and convention entered into for the purpose of creating mutual rights in trade-marks on the part of the citizens of the *United States* and those of other countries.²

2. *Interference.*—An interference is a proceeding created by section 3, of the act of 1881, and the rules of practice established by the Commissioner of Patents pursuant thereof, for the purpose of trying the question of priority of adoption and use between two rival claimants for registration of the same mark, or between one who has already registered and one who is seeking to register a particular mark. The application under the rules of practice is required to state all of the material and essential facts necessary to be proved in an interference proceeding, and must be under oath. The proceeding simply consists, therefore, in the production of

way. Defendants began to run omnibuses similarly painted and marked, and with servants similarly clothed. An injunction was granted to restrain defendants from imitating plaintiffs' line of omnibuses. It was said that nearly all the railroads at the present day have trade-mark symbols by which they and their property are known, and shipping orders of the customers are given in accordance with these marks. *Knott v. Morgan*, 2 Keen 213.

1. *Richter v. Reynolds*, 59 Fed. Rep. 577.

2. *Trade-Mark Treaties with Foreign Nations.*—The following is a list of the governments with which conventions for the reciprocal registration and protection of trade marks have been entered into by the *United States*, with the dates of the respective conventions. For the full text of those which have been published in the Official Gazette, reference is made thereto. For others, to the volume and page of *United States Statutes at Large*. The laws of *Switzerland* and the *Netherlands*, being so framed as to afford reciprocal privileges to the citizens or subjects of any government which affords similar privileges to the people of those countries, the mere exchange of diplomatic notes, giving notice of the fact, accomplishes all the purposes of a formal convention. The reference to the Offi-

cial Gazette opposite these nations gives the full text of their trade-mark laws.

| COUNTRY. | DATE. | REFERENCE. |
|--------------------------|----------------|---|
| Austria-Hungary | June 1, 1872 | Stat., 17, p. 917 |
| Belgium | July 30, 1869 | Stat., 16, p. 765 |
| do | July 9, 1884 | O.G., 29, p. 452 |
| Brazil | Sept. 24, 1878 | Stat., 21, p. 659 |
| France | Apr. 16, 1869 | Stat., 16, p. 771 |
| German Empire | June 1, 1872 | Stat., 17, p. 921 |
| Great Britain | July 17, 1878 | O.G., 14, p. 433 |
| Italy | Mar. 19, 1884 | O.G., 27, p. 304 |
| Russia | June 27, 1868 | Stat., 16, p. 725 |
| Servia | Dec. 27, 1882 | Stat., 22, p. 966 |
| Spain | Apr. 19, 1883 | O.G., 25, p. 98 |
| Switzerland | May 16, 1883 | O.G., 23, p. 2237 |
| The Netherlands | Feb. 16, 1883 | O.G., 23, p. 1334 |
| International Convention | Mar. 20, 1887 | (39 O.G. 960, 26 U.S. Stat. at large, 1370 |

The declaration with *Great Britain* is drawn so as to confer mutual trade-mark rights upon the subjects and citizens of each of the contracting parties throughout the dominions and possessions of the other. Citizens or residents of British colonies are therefore permitted to register their trade-marks under this treaty whenever it is satisfactorily shown that in the respective colonies, similar protection is afforded to citizens of the *United States*. See *infra*, this title, *Trade-Mark Treaties with Foreign Nations*.

evidence to substantiate the claim of the application, and the submission of this evidence to the Examiner of Interferences in conformity to the Rules of Practice of the *United States* Patent Office. An appeal lies from the decision of the Examiner of Interferences to the Commissioner of Patents, without fee, and since the act of 1893, from the Commissioner of Patents to the circuit court of appeals for the *District of Columbia*, and from that court to the Supreme Court of the *United States*, without regard to the amount in controversy.¹

3. *Effect Upon Common-Law Rights.*—The Trade-Mark Statute (Act, March 3d, 1881, 21 Stat. 502, § 10), provides "that nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this act had not been passed."

This language has, ever since the act of 1870,² in which it first appeared, been understood to save undiminished, and in full force and effect, all the common-law rights of both citizens and foreigners, and to prevent any injurious influence to those rights by the act of registration under the Act of Congress. This was believed to be true for the reason that the common-law rights of both citizens,³ and foreigners,⁴ independent of registration, had been fully recognized and enforced long prior to the act, and the sole purpose of the act was to supply an additional means of securing protection for trade-marks, not to curtail any of the rights which previously existed, and it was for this very purpose, and to make this point clear that this section was incorporated in the act. But in several recent cases this clause has been construed, and the fact of registration held to operate as a limitation

1. Sec. 3. In an application for registration, the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the *United States* in analogous cases.

RULES OF PRACTICE.

Sec. 13. In case of conflicting applications for registration, or in any dispute as to the right to use which may arise between an applicant and a prior registrant, the office will declare an interference, in order that the parties may have an opportunity to prove priority of adoption or right; and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences upon applications for patents; but each applicant

and registrant will be held to the date of adoption alleged in the statement filed with his application. On the petition of any party dissatisfied with the decision of the Examiner of Interferences, the case will be reviewed by the Commissioner without fee. The decision of the Commissioner of Patents is final.

2. Act 1870, July 8th, 16 Stat. 198, ch. 2, tit. 60, §§ 4937-4947 of Rev. Stat.

3. See *supra*, this title, *History*.

4. As to rights of foreigners in *Great Britain*, see *Collins Co. v. Brown*, 3 K. & J. 423; *Collins Co. v. Cohen*, 3 K. & J. 428; 5 W. R. 676; *Pisani v. Lawson*, 6 Bing. N. Cas. 90; 37 E. C. L. 293; and in the *United States* see *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1; 3d Act of Treaty with Eng. 1794; *Brown v. Maryland*, 12 Wheat. (U. S.) 447; *Taylor v. Carpenter*, 3 Story (U. S.) 458; *Fils v. Sarrazin*, 15 Fed. Rep. 489.

upon common-law rights which, but for the act, would have been sustained.¹

4. Importation of Foreign Goods Bearing Domestic Trade-Mark.—Section 7 of ch. 1244 of the Act of Congress, Oct. 1st, 1890, provides as follows: "That on and after March first, eighteen hundred and ninety-one, no article of imported merchandise which shall copy or simulate the name or trade-mark of any domestic manufacture or manufacturer shall be admitted to entry at any custom-house of the *United States*. And in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer who has adopted trade-marks may require his name and residence and a description of his trade-marks to be recorded in books which shall be kept for that purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the department fac-similes of such trade-marks; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of the customs." This act permits the registration with the Secretary of the Treasury of any trade-mark used by a citizen of the *United States*, free of charge, subject to such regulations as the Secretary may prescribe.

1. *Richter v. Anchor Remedy Co.*, 52 Fed. Rep. 455; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572; *La Republic Francaise v. Schultze*, July, 1893. These first two cases are pertinent because they cover the two phases of the question. The first is a case where a foreigner registered his marks in this country, and for some reason, but certainly with no purpose of destroying his common-law rights, made a claim which was more limited than his common-law rights. It was held that he had no common-law rights in this country until he had established them by selling his goods here, and also that, having made a limited claim in his registration to a symbol of a "red anchor inclosed in a circle," he had abandoned his claim to the "anchor" broadly.

The second case, *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, is that of a citizen who had sold several articles, designating them as "One Night Cough Cure," "One Night Corn Cure," etc., and who registered the words "One Night Cure" as a trade-mark to be used in association with such other words as he might desire to indicate the particular malady to be relieved. This registration was held to operate as an abandonment of all common-law trade-mark rights which the registrant had previously acquired

in the words "One Night Cough Cure," and that the use of those words associated with the name of the defendant was not an infringement of the registered trade-mark. We cannot think that either of these cases should be followed. However desirable it may be to establish a uniform system of registration for trade-marks, and to have all trade-marks registered, this should certainly not be done at the cost of injuring that elaborate and equitable system of law, which affords such ample and salutary protection to the reputation of an honest trader, under the form of trade-marks and trade names, and the suppression of unfair competition in business, which requires the exercise of an equitable jurisdiction that no system of registration could provide for. It is thought that the better rule, and one which will ultimately be adopted by the courts, is that the registration of a trade-mark under the *United States Statutes*, creates rights, but destroys none. It gives to the registrant the benefit of the act for the mark registered, in addition to such rights as he may previously have had, without in the slightest degree affecting any other rights which he would have enjoyed had he not resorted to the act and registered his trade-mark.

In *Richter v. Reynolds*, 59 Fed. Rep.

Section 6, of the same act, requires that all foreign goods coming into this country shall be plainly marked in English with the country of origin, as "Made in *France*," "Made in *China*," etc. These two sections are directed to the protection of domestic manufacturers, first, by requiring that the country of origin shall be plainly marked upon all imported goods, and that all imported goods which bear the trade-marks of domestic manufacturers or traders, which are registered with the Treasury Department, and which are not made for and imported by the domestic owners of the mark, shall be confiscated by the custom officers. This act does not apply to foreigners, and does not require that domestic trade-mark owners shall register their trade-marks in the *United States* Patent Office before registering them with the Secretary of the Treasury.¹

5. *State Statutes.*—The absence of satisfactory federal legislation relative to trade-marks, and particularly of a criminal remedy for infringement of a trade-mark registered under the *United States* Statutes, has led the states to adopt trade-mark laws of greater

577, Dallas, J., said: "The case of *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, deals with the effect of the registry of one device upon a claim made by the same person to a different device as a common-law trade-mark for use upon the same kind of goods. The court said: 'Moreover, while we do not think it necessary to hold that mere registry in the Patent Office of the *United States*, of a trade-mark for a specific article of manufacture would, of itself, prevent the use and adoption of another device as a common-law trade-mark in domestic markets, yet such registry can operate as evidence tending to show what was really claimed by the complainant. The judgment in *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, is conclusive, also, as to the effect of the registry made by the complainant in this country. As late as July 7th, 1885, he registered as his trade-mark an accurately and definitely defined design, the "essential feature of which" (as he then discloses), "is the representation of a red anchor in the oval space." As evidence tending to show what was really claimed, or had been intended to be appropriated, the court below was clearly right in taking this into consideration, and in our opinion it was right, also, in concluding therefrom that the complainant's intention was to confine his claim of trade-mark to the specific device designated and described, and which he further declared to be the one which he had

"adopted." Upon both the grounds which have been discussed, the complainant's claim to the word "Anchor" and to the symbol of an anchor, irrespective of its being red and inclosed in an oval space, were properly rejected."

1. *Regulation of Treasury Department for Registration of Trade-Marks.*—"Applications for the recording of names or trade-marks in this Department will mention the name and residence of the domestic manufacturer, and furnish a description of the mark and the names of the ports to which the fac-similes should be sent. No such name or trade-mark will be received unless accompanied by the proper proof of ownership, which must consist of the affidavit of the owner, or one of the owners, certified by a notary public or other officer entitled to administer oaths and having a seal. On the receipt by a customs officer of any such fac-similes, with information from the Department that they have been recorded therein, he will properly record and file them, and will exercise care to prevent the entry by the custom-house of any article of foreign manufacture copying or simulating such mark. No fees are charged for recording trade-marks in the Department and custom-houses. A sufficient number of fac-similes should be forwarded to enable the Department to send one copy to each port named in the application. O. L. SPAULDING,

"Assistant Secretary."

or less scope and value. The provisions of these statutes differ in many particulars; some are limited to citizens or those doing business in the particular state; some require registration, some do not; some provide a criminal remedy, some do not. Their multitudinous and varying provisions are the strongest arguments which can be advanced for the passage of a comprehensive federal trade-mark law, making the infringement of a trade-mark a crime.¹

6. *Treaties with Foreign Nations; International Convention.* — Many treaties have been made from time to time between the *United States* and foreign countries, for the protection of the

1. *Alabama*—Acts of *Alabama*, Nos. 319, p. 700, Feb. 14th, 1891, §§ 1, 2, 3, 4, 5, 6. *Arizona*—Revised Statutes of *Arizona* (1887), vol. 1, p. 717; Penal Code, §§ 574, 575, 576, 577, 578, 579. *Arkansas*—Digest of the Statutes of *Arkansas*, vol. 1, §§ 6447, 6448, 6449, 6450, 6451, 6452, 6453, 6454, 6455. *California*—Codes and Statutes of *California*, 2 vols. and Supplement 1877–1878, 1880; ch. vii., art. iii., §§ 3196, 3197, 3198, 3199, 5655 (Civil Code, Div. Second Part 1, tit. 1), 5991, 6772, 13350, 13351, 13352, 13353, 13354. Act Mar. 31st, 1891, ch. 194, p. 217, §§ 1, 2, 3, 4, 5, 6. *Colorado*—Act April 13th, 1891; Laws 1891, p. 46; Laws 1891, pp. 396, 397, 398. *Connecticut*—General Statutes of *Connecticut* (1888), vol. 1, §§ 3956, 3957, 3958, 3959, 3960, 3961, 3962, 3963, 3964, 3965. *Florida*—Revised Statutes of *Florida* (1892), vol. 1, §§ 2481, 2482. *Georgia*—Code of the State of *Georgia* (1882), vol. 1, § 3181. *Illinois*—Act May 8th, 1891; Laws 1891, p. 202. *Indiana*—Revised Statutes of *Indiana* (annotated edition), 1888, with Supplement to 1892, 3 vols.; vol. 2, ch. 99, §§ 6522, 6523, 6524; Revised Statutes of *Indiana* (Supplement), Supplement to Jan. 1st, 1892; vol. 3, ch. 99, p. 848; §§ 8812, 8813, 8814, 8815, 8816, 8817, 8818, 8819, 8820, 8821, 8822, 8823. *Iowa*—Act March 26th, 1892; Laws 1892, ch. 36, p. 63. *Kansas*—Act March 11th, 1891, Laws 1891, ch. 213, pp. 363, 364, 365. *Kentucky*—General Statutes of *Kentucky*, vol. 1, ch. 29, Act XXII., p. 444, §§ 1, 2, 3, 4; pp. 493, 494, 496; Acts 1889–1890, p. 99, ch. 823, April 16th, 1890, §§ 1, 2, 3, 4. *Maine*—Act March 28th, 1893; Laws 1893, ch. 276, p. 330. *Maryland*—Laws of *Maryland* (1892), ch. 262, p. 354, amending §§ 201, 202, 203, 204, 205, 206 of Article 27 of the Code of Public Gen-eral Laws (1888); Laws of *Maryland* (1892), ch. 357, p. 500, §§ 1, 2, 3, 4, 5, 6. *Michigan*—Act April 24th, 1891, Public Acts 1891, pp. 39, 40, 41. *Minnesota*—Act April 17th, 1893; General Laws 1893, ch. 24, pp. 126, 127, 128. *Mississippi*—Annotated Code of *Mississippi* (1892), vol. 1, §§ 1306, 1307, 1308. *Missouri*—Act March 20th, 1893; Laws 1893, p. 260, etc.; Act March 31st, Laws 1893, pp. 256, 257, 258, 259. *Nebraska*—Act March 31st, 1891; Consolidated Statutes, §§ 2083 to 2087, inclusive. *Nevada*—General Statutes of *Nevada* (1885), vol. 1, §§ 4918, 4919, 4920, 4921, 4922, 4923, 4924, 4925, 4926, 4927, 4928, 4929, 4930. *New Jersey*—Revision of *New Jersey* (1709–1877), Supplement 1877–1886, § 186, p. 259; Appendix A, p. 1336, §§ 1, 2, 3. *New Mexico*—General Laws of *New Mexico* (1882), vol. 1, p. 306. *North Carolina*—The Code of *North Carolina* (1883), 2 vols; vol. 1, § 1040. *Ohio*—Revised Statutes of *Ohio* (1892), 3 vols., §§ 7069, 7072, 7073, 7096, 7098, 7120, 7121. *Oregon*—Hill's Annotated Laws of *Oregon* (1887), 2 vols., §§ 4192, 4193, 4194, 4195, 4196, 4197, 4198, 4199. *South Dakota*—Act March 7th, 1890; Session Laws 1890, ch. 153, p. 321. *Tennessee*—Code of *Tennessee* (1884), vol. 1, § 5626. *Utah*—Compiled Laws of *Utah* (1888), 2 vols., § 4551, vol. 2, p. 603; §§ 4552, 4553, 4554, 4555. *Vermont*—Revised Laws of *Vermont* (1880), vol. 1, §§ 4163, 4164. *Virginia*—Acts of Assembly 1889–1890, p. 53, ch. 71, as amended by the Act Feb. 12, 1892 (Acts of Assembly) 1891, Laws of 1891–1892, ch. 204, p. 326, §§ 1, 2, 3, 4, 5, 6, 7. *Washington*—Act of Feb. 21st, 1891; Laws 1891, ch. 16, pp. 29, 30. *Wisconsin*—Act April 16th, 1891; Laws 1891, ch. 280, p. 353. Vol. 2, Sanborn & Berryman, Annotated Stat. (*Wisconsin*), 1889, §§ 4463, 4464, 4470a, 1, 2, 3, 4-

trade-marks of the citizens of each country in the other, but on March 20th, 1887, an International Convention was entered into by the *United States with Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, Switzerland, Great Britain, Luxemburg, Mexico, Norway, Paraguay, Roumania, Sweden, Tunis, Uruguay, the Dominican Republic.*¹

The International Convention repealed and abrogated all previous treaties entered into between these countries.²

1. Some question has arisen as to the right of a foreigner to bring suit in the courts of the *United States* for the infringement of a trade-mark, without registering his trade-mark under the *United States Statute*. This question is suggested in the case of *Richter v. Anchor Remedy Co.*, 52 Fed. Rep. 455. One phase of the question was decided by Townsend, J., in the *United States* circuit court, Southern District of *New York*, July 1st, 1893, in the case of *La Republique Francaise v. Schultz*.

In *Trade-Mark Record*, Aug. 16th, 1893 (*The Vichy Case*), the court says: "In the Industrial Property Treaty of 1887, these three expressions are used: 'Marque de Fabrique,' translated, 'Trade-Mark;' 'Marque de Commerce,' translated, 'Commercial Mark;' 'Nom Commercial,' translated, 'Commercial Name.' The treaty provided that every 'trade-mark or commercial mark regularly deposited in the country of origin, shall be admitted to deposit, and so protected in all the other countries of the union.' 26 U. S. Stat. at Large, art. 6, p. 1376. And the final protocol on page 1380, paragraph 4, is as follows: Paragraph 1, of art. 6, is to be understood in the sense that no trade or commercial mark shall be excluded from protection in one of the states of the union by the mere fact that it may not satisfy, in respect to the signs composing it, the conditions of the laws of this state, provided that it does satisfy in this regard the laws of the country of origin, and that it has been in this latter country duly deposited. Saving this exception, which concerns only the form of the mark, and under reservation of the provisions of the other articles of the convention, the domestic legislation of each state shall receive its due application. Art. 8, of the treaty is as follows: 'The commercial name shall be protected in all the countries of the union without

obligation of deposit, whether it forms part or not of a trade or commercial mark.' The court held the term "Vichy" to be a commercial name not requiring registration by express operation of the convention, but left undecided the question whether either trade-marks or commercial marks require registration.

2. The purpose of the convention was to form a union of the governments assenting thereto. The original articles were adopted on the 20th of March, 1883, at Paris, and acceded to by *Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, and Switzerland*, the latter state being assigned the position of Intermediary, through whom those adhering to the union were to communicate with other states in relation to the union. Subsequently, other states gave their adhesion and became members of the union, viz.: *Great Britain, Luxemburg, Mexico, Norway, Paraguay, Roumania, Sweden, Tunis, Uruguay, and the United States*. The ratification of the convention and protocols on the part of the *United States* was advised by the Senate, and the President ratified the same March 29th, 1887. Article 2 provides that the subjects or citizens of each of the contracting states shall enjoy, in all the other states of the Union, so far as concerns . . . (1) trade, or (2) commercial marks, and (3) the commercial name, the advantages that the respective laws thereof accord to subjects or citizens; in consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each state. For full text of the articles and protocols see 39 Pat. Off. Gaz. 960; 26 U. S. Stat. at Large 1376.

The important nations which have not joined the International Convention are: *Germany, Denmark, Russia, Austria, Turkey, Egypt, Greece, China, Japan, Chili, Peru, Argentine.*

VII. ASSIGNMENT AND TRANSFER.—1. General Rule.—A trade-mark is assignable by the act of the parties owning it, or by operation of law, subject to certain limitations. The primary function of a trade-mark is to indicate ownership and origin, and unless this is truthfully done, the trade-mark becomes a means of fraud upon the public and will not be protected. It therefore follows that, if a trade-mark is a personal one, designating a particular person, and his personal reputation and skill, it cannot truthfully be used by any other person, and consequently cannot be assigned.¹ For the same general reason, a trade-mark which has been used to designate the origin and ownership of a particular article, or the products of a particular establishment or business, which is not personal in its nature, cannot be applied to any

1. In *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, Cas-sody, J., said: "The mere fact that each and all of the Fishes withdrew from that business, did not prevent the words mentioned from continuing to point to the old place of business and the old firm of Fish Bros. and Fish Bros. & Co., at Racine, as the true source and origin of their particular make and style of wagon and vehicle, to which the plaintiff company succeeded, and continued to manufacture at Racine. It is true that one of the functions of a trade-mark is to point out the true ownership of the goods or articles to which it is applied, and that the words 'Fish Bros.' and 'Fish Bros. & Co.' partially ceased to perform that office when Mr. Case became the ostensible owner or mortgagee, and still more so when the legal title passed to the receivers respectively, and finally became extinct when the property and assets became vested in the plaintiff; but such extinction did not prevent those words from performing the two other functions of a trade-mark mentioned."

In *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149, Allen, J., said: "There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and, in such cases, it would be a fraud upon the public if the trade-mark should be used by other persons, and

for this reason such a trade-mark would be held to be unassignable. It is in any case a question whether the use of the trade-mark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which should contain a misrepresentation to the public. *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark which contains a person's name, and that all that purchasers would reasonably understand is, that goods bearing the trade-mark are of a certain standard, kind or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark. . . . *Kidd v. Johnson*, 100 U. S. 617. See also *Warren v. Warren Thread Co.*, 134 Mass. 247; *Sohier v. Johnson*, 111 Mass. 238; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Hall v. Barrows*, 4 De G. J. & S. 150; *Bury v. Bedford*, 4 De G. J. & S. 352, 369, 370."

In *Matter of Swezey*, 62 How. Pr. (N. Y. C. Pl.) 215, Van Hoesen, J., said: "Now the question here is, whether or not the trade-mark in question owes its value to the personal skill of Mr. Darst as a manufacturer. If it does, it does not pass by assignment, for the

public must not be deceived into buying goods which, though bearing his trade-mark, are not the product of his peculiar skill. If, however, it is the machinery, the factory, which has produced superior goods, the trade-mark goes with the machinery. In other words, the trade-mark is inseparable from the particular thing which gives it its value."

In *Skinner v. Oakes*, 10 Mo. App. 45, Thompson, J., said: "The first question therefore, is, whether a trade-mark which consists of the name of a third person is such a species of property that it can be disconnected from the business with which such person was formerly connected, and sold from man to man. The second is, whether the use of the name of the third person in such a way does not involve such a fraud upon the public as will prevent a court of equity from protecting it. . . . The principle on which all cases on the subject of trade-marks unite is, that one man will not be permitted, by imitating the distinctive name or mark used by another person to designate articles of the latter's manufacture, to impose articles of his own manufacture upon the public as the articles of the former. The cases so holding rest upon two considerations: First, that it would be a fraud on the rights of the former person thus to permit his trade-mark to be imitated; Second, that it would also be a fraud on the public. See *Gilman v. Hunnewell*, 122 Mass. 139; *McLean v. Fleming*, 96 U. S. 245, 251; *Coleman v. Crump*, 70 N. Y. 573; *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Devlin v. Devlin*, 67 Barb. (N. Y.) 290; 25 Am. Rep. 173; *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y. Supreme Ct.) 297; *Curtis v. Bryan*, 2 Daly (N. Y.) 312; 36 How. Pr. (N. Y.) 33; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 607; *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394; *Howe v. Howe Machine Co.*, 50 Barb. (N. Y.) 236; *Sykes v. Sykes*, 3 B. & C. 541; 10 E. C. L. 176; *Burgess v. Burgess*, 3 De G. M. & G. 896, 904; *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204; *Emerson v. Badger*, 101 Mass. 82; *Ellis v. Zeilin*, 42 Ga. 91; *Lord Kingsdown*, in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 538; *Perry v. Truefitt*, 6 Beav. 66; *Walton v. Crowley*, 3 Blatchf. (U. S.) 448; *Dixon Crucible Co. v. Guggenheimer*, 1 Cox's Man. of Trade-Mark Cases 559. . . . There

are some *quasi* proprietary rights, such as the elective franchise, which are incapable of assignment. But it would be obviously unjust so to restrict the right to use a trade-mark. The advantages which accrue from the use of a particular trade-mark or advertising device are often the result of a lifetime of integrity, skill, perseverance, and business capacity. Ought it to be held that a right so valuable should die with the person who created it, it being incapable of assignment, when, by reason of age, or other considerations, he might desire to cease using it? The custom of trade, which solves many questions in advance of the courts, has declared that this should not be; and the courts, in adopting the view that the right to use a trade-mark is assignable, did no more than declare a result which followed from the concession that it was property; for the *jus disponendi* is embodied in the very idea of property. It is hence settled law that the right to use a trade-mark is not a mere personal privilege, but that, within certain limits, it is capable of being bought and sold as other property. 'A trade-mark,' says Strong, J., 'like the good-will of a store or manufacturing establishment, is a subject of commerce, and it has been many times held entitled to protection at the suit of vendees.' *Fulton v. Sellers*, 4 Brew. (Pa.) 42. See also *Bury v. Bedford*, 33 L. J. Ch. 465; *Hall v. Barrows*, 33 L. J. Ch. 204; *Glenn, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Peltz v. Eichele*, 62 Mo. 171. . . . But where the trade-mark consists of a name, how far it is capable of assignment is a more difficult question. We think that the answer to this question depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by the courts; for to do so would be to protect the perpetration of a fraud upon the public. Thus, if an author were to assign to another the privilege of publishing books with his name upon their title-page, or if a painter were to sell to another the privilege of placing the former's signature on pictures painted by the latter, it cannot for a moment be supposed that any court

would protect such a supposed right, even as against the original assignor. This point is absolutely clear, both upon principle and authority. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 534; *Samuel v. Berger*, 4 Abb. Pr. (N. Y. Supreme Ct.) 88."

In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1, Daly, C. J., said: "A person may acquire the right known as the good-will in a business from its being established in a particular place, from which he has derived, or may derive, profit, and where there is attached to the business a name indicating to the public where, or in what manner, it is carried on; and this is a right which will be protected in a court of equity, even where he removes the business to another place. (61 N. Y. 232; 3 L. T. N. S. 547; 3 Sandf. (N. Y.) 725; 12 How. Pr. (N. Y.) 77.) The proprietary interest which a person has in his name, so far as any pecuniary value arises from the use of it, which a court of equity would protect, or which may be transmissible by assignment, is necessarily connected with some business, trade-mark, or other interest, through which a pecuniary value has become attached to it. The proprietary right which a man has acquired in a trade-mark, or in the use of his name, or in any name, general or otherwise, which designates a particular business established and carried on by him, involving what has been previously described as the good-will of the business, is, being in the nature of property, transmissible by assignment or bequest. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 230; 19 Am. Rep. 278; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 142; *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 57 Barb. (N. Y.) 526; 45 N. Y. 291; 6 Am. Rep. 82; *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; *Hitchcock v. Cohen*, 6 Ad. & El. 438, 449; 33 E. C. L. 98; *Howe v. Searing*, 6 Bosw. (N. Y.) 354; *Churton v. Douglas*, 1 Johns. 176; *Ainsworth v. Walmsley*, 44 L. J. R. 242; *Derringer v. Plate*, 29 Cal. 292; *Hall v. Barrows*, 4 De G. J. & S. 156-158; *Croft v. Day*, 7 Beav. 84; *Bradbury v. Dickens*, 27 Beav. 53; *McLean v. Fleming*, 96 U. S. 250, and will pass with the sale of the business to which the name or trade-mark is attached; or under a general assignment for the benefit of the creditors, which by its terms transfers all the insolvent's property for the payment of his debts, although

it may not be specified in the schedule annexed to the assignment, or which, under our statute, is subsequently made out and filed. *Hall v. Barrows*, 4 De G. J. & S. 156-158; *Bury v. Bedford*, 33 L. J. Ch. (N. S.) 465; *Edleston v. Vick*, 11 Hare 78; *Hudson v. Osborne*, 39 L. J. Ch. 79; *Couch v. Delaplaine*, 2 N. Y. 397; *Cram v. Union Bank*, 1 Abb. App. Dec. (N. Y.) 461; *Miller v. Halsey*, 4 Abb. Pr. N. S. (N. Y. Supreme Ct.) 33. When, however, the whole pecuniary value of the name, in its connection with an article of merchandise, or a manufacture, or a business, is derived solely from the personal qualities of the one to whom the name belongs, such as his skill, special knowledge and experience, or from the fact that the article is produced under his personal supervision, which imparts to it an especial value; then the right to the name is not transmissible. It is then purely personal; and this is equally so with a trade-mark used and recognized, as denoting that the article or product is made by a particular person, whose skill, experience, or other personal quality, or whose personal experience, in the fabricating, preparation or production of it, gives to it a peculiar value, which is distinguishable from a trade-mark used as a brand of quality, or of texture, fineness, or other characteristics; or to indicate that it is made in a particular establishment or manufactory, or where a name simply denotes an established business, with whatever advantages may accrue from its long establishment, the fact that it is generally or widely known, and the confidence it inspires from its duration. *Hall v. Barrows*, 4 De G. J. & S. 156-158; *Bury v. Bedford*, 33 L. J. N. S. Ch. 465; *Carnichel v. Lattimer*, 11 R. I. 395; 23 Am. Rep. 481. . . . It has been decided in several cases, that where a man has introduced a new medical preparation and given it a title, a component part of which is his own name, as indicative of the true origin and ownership of the article, and not used simply to designate the article itself, and assigns to another all his interest in it, with the sole right thereafter, to manufacture and vend it, the transfer carries with it the right to use the name by which it has become known. . . . But it has been held, that if the assignee, who has acquired the right to manufacture an article which was manufactured at a particular place,

other article of different origin, without falsely stating the origin of that article. Hence, it is held. that a trade-mark cannot be assigned except in connection with the particular business in which it has been used, and for continued use upon the same article or class of articles to which it was first applied and used by its original adopter.¹

manufactures it at another place, but continues to use the former trade-mark, which states where the article was manufactured, and that it had certain qualities, some of which the assignee omitted in his manufacture of it, that no right existed in such a case to use the former trade-mark, for the reason that what was upon it was then untrue. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 542."

1. In *McVeagh v. Valencia Cigar Factory*, 32 Pat. Off. Gaz. 1124, Morgan J., said: "The sole question in the case is whether such arbitrary sign or trade-mark can be assigned or sold, no matter what the consideration may be, or be transferred as a bare sign, as a bare trade-mark, a word, a fanciful term, to some other person, regardless of the question whether that person is engaged in the business of manufacturing the article in connection with which the term has been used, or regardless of the fact whether that person takes the good-will of the business, buys out the entire business, and takes the business in connection with which the sign or arbitrary trade-mark has been used. There is no case that can be found, none cited by counsel at all, which in any manner supports the proposition that a bare trade-mark, aside from the property, can be assigned, sold, or a good title given to it, upon the transfer of a bare fanciful term or word in connection with the scroll and device that was used by Louis Cohn & Son, to a person for that person to sell and use, as if it were his property. It might as well be sold to a doctor as to be sold to a man carrying on the grocery business. The transfer of it to a physician or surgeon or to a livery-stable keeper, would pass it just as completely as it can possibly pass in an assignment by such a contract. It is not necessary in this opinion, for the court to say whether the defendants have any trade-mark or not. That is outside of this case, and it is of no consequence. The point is whether there is, any trade-mark now in existence that is the subject of property to

to any person which can be protected by any operation of a court of chancery. If there is any such property, it is not in these assignees."

In *Julian v. Hoosier Drill Co.*, 78 Ind. 408, Morris, C., said: "The second paragraph of the complaint alleges that on the 27th day of February, 1877, the said Ingells transferred and assigned to the appellant all of said letters patent, by an instrument in writing, duly executed by him, and also all the right to and property in said trade-mark which he then had or owned, and the exclusive right to use said trade-mark upon grain drills. . . . It is then averred, that, from the time the appellant purchased said letters patent and said trade-mark, she had the right to manufacture and sell grain drills with said trade-mark affixed thereto and inscribed thereon, and the exclusive right to use the same. . . . It seems also to be agreed, that a party may have a property in a trade-mark, and that his right to and property in it may be transferred and assigned. . . . This assignment and transfer carried with it to the assignee the exclusive right to manufacture and sell the grain drill specified in the letters patent, and to carry on the business of making and selling the same. It was a transfer to appellant of the right to carry on the business in which Joseph Ingells had been engaged, and in connection with which he had used said trade-mark. As incident to the right thus transferred to the appellant, Joseph Ingells might, as he is averred to have done, assigned to her his right to and property in said trade-mark. The assignment and the right to make it did not, in any way, depend upon the time at which the appellant might engage in business. Nor was it necessary to the validity of the transfer of the trade-mark, that the place of business or drills actually manufactured should be transferred. It was enough if the right to engage in the business was assigned; as incident to the assignment of this right, it was quite competent to assign the right to the

trade-mark;" citing *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Croft v. Day*, 7 Beav. 84.

In *Weston v. Ketcham*, 51 How. Pr. (N. Y. Super. Ct.) 455, Sedgwick, J., said: "Mrs. Pepper did not succeed to any business of her husband's which, continuing, a trade-mark belonging to it might continue. Her husband left no such business, and there is no such thing as a trade-mark in 'gross,' to use that term by analogy. It must be 'appendant' of some particular business in which it is actually used upon or in regard to specific articles. And she in no way disclosed by the evidence—and I do not see how any could possibly exist—became possessed of the right to transfer to anyone the right to use her deceased husband's name."

In *Witthaus v. Braun*, 44 Md. 303; 22 Am. Rep. 44, Robinson, J., said: "The appellees contend that a trade-mark, being a mere device or symbol to designate the manufacture of an article by a particular person, or at a particular place, there is no such thing as a right of property in such trade-mark, apart from the article to which it is affixed, and which it has been used to designate, and that a purchaser, therefore, can acquire no right of property, by the bare sale of the trade-mark itself. Conceding this to be so, it is equally well settled, that where a trade-mark is used to designate the place, and the person by whom the goods are made, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made. Since the cases of *Banks v. Gibson*, 34 Beav. 566; *Hall v. Barrows*, 10 Jur. N. S. 56; *Bury v. Bedford*, 33 L. J. Ch. 465, and *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, this can no longer be considered an open question.

The mere sale of a trade-mark apart from the article to which it is affixed, confers no right of ownership, because no one can claim the right to sell his goods, as goods manufactured by another. To permit this to be done, would be a fraud upon the public. But where, as in this case, the trade-mark is assigned to the person who manufactured the tobacco to which the trade-mark was affixed, there is no false representation to the

public, because the tobacco is still manufactured at the same place, and by the same person. It is, in fact, the same article."

In *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321, Paxson, J., said: "Not only may a man be enjoined against using the trade-mark of another, but he may be restrained from using his own name.* Bâjou was prevented, as we have seen, from stamping his own name upon his own gloves; and we are not without authority to the same point in this country and in *England*. . . . If there is no such property in a trade-mark as is capable of assignment, or will pass to a man's family or legal representatives after death, it is quite time the principle was thoroughly known and understood, in order that persons may not buy, and pay large amounts of money for a thing which possesses no value whatever beyond the life of the purchaser, or his ability to use it. . . . Property in trade-marks may be obtained by transfer from him who has made the primary acquisition. (*Upton on Trade-Marks* 52.) The true rule to be deduced from these cases would appear to be this: That the property, or right to a trade-mark, may pass by an assignment or by operation of law, to anyone who takes at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representative." See also *Samuel v. Berger*, 4 Abb. Pr. (N. Y. Supreme Ct.) 88; 24 Barb. (N. Y.) 163; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281; 1 How. App. Cas. (N. Y.) 547; *Howe v. Searing*, 10 Abb. Pr. (N. Y. Super. Ct.) 264; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723.

In *Rowley v. Houghton*, 2 Brew. (Pa.) 303, Ludlow, J., said: "The complainant, however, has purchased those rights; he is the owner of the original trade-mark; he has an undoubted legal right to use it; and he has seen fit to add to that name the letters 'ine,' and to establish in the market a value to the new trade-mark. These facts being admitted, the defendant is driven to the position that he is entitled to this peculiar trade-mark because he sug-

A trade-mark may sometimes contain the name of a person

gested the name to the complainant. The law, as settled, will, however, hardly sustain the claim of the defendant. It was demonstrated in *Colladay v. Baird*, 4 Phila. (Pa.) 139, that no right can be absolute in a name, as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark."

In *Ainsworth v. Walmsley*, L. R., 1. Eq. 518, Wood, V. C., said: "And inasmuch as the court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which, being protected by this court, may be disposed of for value, may be bought and sold, and is, therefore, in that sense of the word, property."

In *Hall v. Barrows*, 4 De G. J. & S. 150, the Lord Chancellor said: "The distinction between a name and a trade-mark must be observed. If a name impressed upon a vendible commodity passes current in the market as a statement or assurance that the commodity has been manufactured by a particular person, it may be true that this court would not sell and transfer to another person the right to use the name simply and without addition; but if it sold the business or manufacture carried on by the owner of the name, it might give to the purchaser the right to represent himself as the successor in business of the first maker, and in that manner use the name. . . . But it is unnecessary to pursue this further; for I am of opinion that these initial letters, surmounted by a crown, have become and are a trade-mark, properly so called—that is, a brand which has reputation and currency in the market as a well-known sign of quality; and that, as such, the trade-mark is a valuable property of the partnership as an addition to the Bloomfield Works and may be properly sold with the works, and, therefore, properly included as a distinct subject of value in the valuation to the surviving partner. It must be recollected that the question before me is simply whether the right to use the trade-mark can be sold along with the business and iron works, so as to deprive the surviving partner of any right to use the mark, in case he should set

up a similar business. Nothing that I have said is intended to lead to the conclusion that the business and iron works might be put up for sale by the court in one lot, and that the right to use the trade-mark might be put up as a separate lot, and that one lot might be sold and transferred to one person and the other lot sold and transferred to another, the case requiring only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property, and might be sold with the business and works and as a valuable right, and if it might be so sold, it must be included in the valuation to the surviving partner."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, the Lord Chancellor said: "But suppose an individual or a firm to have gained credit for a particular manufacture, and that the goods are marked or stamped in such a way as to denote that they are made by such person or firm, and that the name has gained currency and credit in the market (there being no secret process or invention); could such person or firm, on ceasing to carry on business, sell and assign the right to use such name and mark to another firm carrying on the same business in a different place? Suppose a firm of A. B. & Co., to have been clothiers in Wiltshire for fifty years, and that broadcloth marked A. B. & Co., makers, Wilts., has obtained a great reputation in the market, and that A. B. & Co., on discontinuing business, sell and transfer the right to use their name and mark to a firm of C. D. & Co., who are clothiers in Yorkshire; would the latter be protected by a court of equity in their claim to an exclusive right to use the name and mark of A. B. & Co.? I am of opinion that no such protection ought to be given. It is true that a name or the style of a firm may by long usage become a mere trade-mark, and cease to convey any representation as to the fact of the person who makes, or the place of manufacture; but where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion, which is false, I think no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained."

who was the founder of a business, and it may be assigned with his business, coupled with a contract on the part of the party himself not to use his own name upon a similar article,¹ or the proper name may by use have lost all of its personal nature and become only a designation of a particular establishment, character

1. In *H. A. Williams Mfg. Co. v. Noera*, 158 Mass. 110, Holmes, J., said: "On February 28th, 1890, the plaintiff purchased the stock in trade and goodwill of Francis Draper & Co., including the possession of their factory, of which they were tenants at will, and took a covenant from the members of the firm not to engage in the manufacture of oil cans for ten years. . . . We infer that Draper & Co. acquired a right to be protected to the usual extent in the use of the word 'Draper,' and we see no sufficient reason to doubt that, in view of the continuity of the business, the name was capable of assignment by Draper & Co. to the plaintiff. *Russia Cement Co. v. LePage*, 147 Mass. 209; *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149; *Bury v. Bedford*, 4 De G. J. & S. 352."

In *Jennings v. Johnson*, 37 Fed. Rep. 364, Colt, J. said: "The plaintiff in this case is the owner of a remedy known as 'Johnson's Anodyne Liniment,' and this suit is brought to enjoin the defendant from putting up and offering for sale a liniment of his own manufacture, in a form so closely resembling that of the plaintiff's article that the public are liable to be deceived thereby, and a portion of the plaintiff's business unlawfully taken away. The liniment was first prepared by Abner Johnson, about the year 1810. In 1846, he took his son, Thomas Johnson, into partnership. In 1848, the business was conducted by Thomas Johnson and his brother, I. S. Johnson, the father having died that year. In 1849, Thomas Johnson died, and the business was then carried on by I. S. Johnson until 1866, when he sold a part of his interest to the complainant. This continued until 1876, when the complainant bought out the entire interest of I. S. Johnson, and became the sole proprietor of the business. Upon the evidence, I think the complainant has shown such a proprietary right to this business, and to the use of the bottles, labels, and wrappers with which this medicine has been associated and identified, as entitles him to maintain this action against this defendant, and

therefore the first defense of want of sufficient title in the complainant falls to the ground. . . . The plaintiff Jennings was one of the firm of I. S. Johnson & Co. In stating on the label that the liniment is prepared by I. S. Johnson & Co., he merely retains the name of the firm of which he was a member. I cannot see how the public are deceived or injuriously affected by such a course. It is not uncommon, under such circumstances, to retain the old firm name. The facts in the case of *Manhattan Medicine Co. v. Wood*, 105 U. S. 218, were quite different. In the present case I am satisfied that a decree should be entered for the complainant, and it is so ordered."

In *Burton v. Stratton*, 12 Fed. Rep. 696, Brown, D. J., said: "But the cases are numerous in which it has been held that a party may lawfully assign and sell, not only a trade-mark indicative of origin in himself, but even the right to use his own name in connection with a particular business."

In *Probasco v. Bouyon*, 1 Mo. App. 241, Bakewell, J., said: "The names of 'Oakes Candy,' 'Oakes Pure Candies,' etc., were, it appears, first used and applied by Probasco & Oakes to candies flavored with fruits, and made and sold by that firm, and under that name acquired a reputation and sale. These names pointed out the origin and ownership of the manufacture. By the dissolution of the firm, and Oakes' sale to Probasco, the latter acquired the rights of the firm to this name. Oakes could so sell his name as to deprive himself of the right to use it for his own manufacture, and give that right to another, under the circumstances of this case, as detailed above. *Young v. Stonebreaker*, 33 Mo. 117. . . . So, in like manner, whatever rights other men may have to the name of Oakes, this particular Oakes, the defendant in this case, will not be permitted to use the name of Oakes in the manufacture and sale of candy, at least in this locality, where the name has a peculiar signification and a business value, and where he is bound by a valid agreement to abstain

of goods, or business, in which case an assignment of the establishment, the exclusive right to make the particular character of goods or the business, will transfer to the purchaser a right to use such name as a trade-mark in continuing the same business.¹

from the use of his name. If it is claimed that Oakes has a right to use his own name, the answer is that he has no right to use it in this way, if he has sold that right, and if, as we hold, it was a right which he could sell and which plaintiff could acquire. . . . Oakes may still make and sell candy, but not under the name the use of which he has for this purpose sold. He may make and sell the very same candies, and is not obliged to conceal the fact that they are made by him; but he may not, in St. Louis, advertise them, either by sign over his shop door, or by label on the boxes in which they are packed, or in any other general and public way, as 'Oakes' Candies.'"

1. *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149. In *Dant v. Head*, 90 Ky. 255, Lewis, C. J., said: "The defense that the distiller's brand was not a subject of sale and transfer, and therefore formed no consideration for the alleged agreement, because the use thereof by another than F. M. Head & Co. was deceptive, is not valid; for it is well settled that a trade-mark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment."

In *Pepper v. Labrot*, 8 Fed. Rep. 29, Matthews, C. J., said: "The defendants claim that the use of the name (Old Oscar Pepper Distillery) by the complainant as a brand for their whiskey, manufactured elsewhere, would be a fraud on the public, as well as on the defendants. . . . Tried by these principles, it would seem that the trade-mark claimed by the complainant cannot be sustained as a designation of whiskey manufactured by him without reference to the place of its production, and that it is not, therefore, a lawful trade-mark at all, in the proper sense of that term. It is rather the trade name of the distillery itself, of which he was at one time the proprietor, but which now is the property of the defendants. Neither by its own meaning, nor by association, does it indicate the personal origin or ownership of the article to which it is affixed. It does not seem to give notice who was the producer. It could be applied

by him, with truth, to his goods only while he was the owner of the distillery named, and then only, not to all whisky of his manufacture, but only to that actually produced at that distillery. It can now be used without practicing a deception upon the public only by the defendants. It points only at the place of production, not to the produce. If a trade-mark at all, in any lawful sense, it is only in its use in connection with the article which it truthfully describes; that is, whisky which is actually manufactured at the Old Oscar Pepper Distillery, in Woodford County. *Hall v. Barrows*, 4 De G. J. & S. 157; *Motley v. Downman*, 3 Myl. & C. 1; *Kidd v. Johnson*, 100 U. S. 617."

In *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, Shipman, J., said: "The medicine has become well known, mainly through the efforts of Dr. Filkins to introduce it to the public, has quite a large sale among druggists, and has been a source of profit. It is now made by the plaintiffs substantially according to the original formula which was furnished by Dr. Blackman, and the plaintiffs have never abandoned the use of the original name. The name of the inventor, 'J. Blackman,' is the distinctive part of the name or title of the medicine, and gives to the title its peculiar value. Newton M. Blackman, who is the son of Jonas Blackman, has engaged in the manufacture of the same medicine, which is put up in bottles encircled with labels closely resembling those which are used by the plaintiffs, and containing the same title or name, 'Dr. J. Blackman's Genuine Healing Balsam.' The defendant states, in his affidavit, that his father has sold him the formula, and the right to manufacture the medicine, and to use the father's name. The question in the case is whether or not the plaintiffs now have a clear and exclusive continuing right, under the contract which was entered into between Jonas Blackman and Morgan L. Filkins, to the use of the name which was originally given to the medicine by the inventor, and whether or not, therefore, the plaintiffs held the right, at the time of the registration of the

trade-mark, to its exclusive use after January 1st, 1876. The following general principles in regard to the assignment of the exclusive use of trade-marks are applicable to this case. The name, 'Dr. J. Blackman's Genuine Healing Balsam,' which was originally given to the medicine by the inventor, 'points out distinctly the origin or ownership of the article to which it is affixed,' and the words 'were appropriated as designating the true origin or ownership of the article or fabric to which they are attached.' *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311. The name, as a whole, was his trade-mark, which he had the exclusive right to use, and the exclusive use of which would pass, by assignment, to any one who had lawfully obtained from the inventor the exclusive right, also, to manufacture and sell, and who did sell, that particular article compounded according to the original formula. 'The property or right to a trade-mark may pass, by an assignment, or by operation of law, to any one who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives.' *Dixon Crucible Co. v. Guggenheim*, Am. Trade-Mark Cases, 559 . . . The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached. It is not, however, necessary that an article to which a trade-mark, personal in its inception, was originally affixed, should always be manufactured at the same place where it was originally made. This particular trade-mark, being the name of the inventor, was personal to Dr. Blackman, in its inception, but has been permitted by him to be applied, and to be appropriated, to the same article when manufactured by Filkins Bros. Under the circumstances in which the medicine has been manufactured and sold, the use of the trade-mark does not imply that the medicine was manufactured by Jonas Blackman, but that it is the same article which he originally invented and manufactured. *Bury v.*

Bedford, 10 Jur. N. S. pt. 1, 503; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. N. S. 513."

In *Sohl v. Geisendorf*, 1 Wilson (Ind.) 60, Rand, J., said: "The authorities establish the proposition that a trade-mark may be devised and adopted by the party himself, or he may acquire it by purchase from his predecessor. The mode by purchase is as effectual as any other, and courts will go as far to protect such trade-mark as if the party devised and adopted it. . . . I know no reason why a party cannot purchase a part of a trade-mark, and devise and adopt the balance. See *Millington v. Fox*, 3 Myl. & C. 338; *Dixon Crucible Co. v. Guggenheim*, 3 Am. L. T. 288; *Croft v. Day*, 7 Beav. 84; *Tilly v. Fossett*, 17 Am. Law Reg. 402; *Coffeen v. Brunton*, 4 McLean (U. S.) 516."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, Lord Cranworth said: "But I farther think that the right to a trade-mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise, where the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be, whether the purchaser in continuing the use of the original trade-mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark. In such a case

I see nothing to make it improper for the purchaser to use the old trade-marks, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased." In the same case Lord Kingsdown said: "With respect to the use of the words 'J. R. & C. P. Crockett, manufacturers,' the question is involved in more difficulty. Though a man may assign his business and the use of his firm name and of his trade-mark as belonging to it, that proceeds, in my opinion, upon the ground which I have stated, that the use of the name of the firm is not understood in trade to signify that certain individuals, and no others, are engaged in the concern. Though a man may have a property in a trade-mark in the sense of having a right to exclude any other trader from the use of it in selling the same description of goods, it does not follow that he can in all cases give another person a right to use it, or to use his name. If an artist or an artisan has acquired, by his personal skill and ability, a reputation which gives to his works in the market a higher value than those of other artists or artisans, he cannot give any other persons the right to affix his name or mark to their goods, because he cannot give to them the right to practice a fraud upon the public. The reference to the Crocketts, in the words to which I have adverted, is obviously not used as representing the name of the plaintiff's firm, for that is stated in the circle of the trade-mark. Can it be understood as meaning only that the plaintiffs have succeeded to, and are entitled to use, the name of that firm? I think that it cannot, and that it must be understood to mean that those individuals personally, are concerned in the manufacture of the goods so stamped. This is a circumstance calculated, if true, to give an increased value to the goods, and being untrue, it seems to me to amount to an imposition upon the public."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, the Lord Chancellor said: "The question then arises, what amounts to a material false representation? Suppose a partnership to have been formed a century ago under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of

successive partnerships, trading under the same original style, although the names of the present partners are wholly different from those in the original firm; is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered without any doubt in the negative; for it is competent by the law of *England* to a partnership, to adopt any style or firm which does not involve a claim to incorporation or the assumption of what belongs to others, and the practice of the trading community in this respect is so common and general that no misleading of the public can result from it."

In *Hall v. Barrows*, 4 De G. J. & S. 150, the Lord Chancellor said: "The master of the rolls is of opinion that the right to use local trade-marks may be sold with the manufactory or works to which such marks refer; but that the right to use personal trade-marks ought not to be sold, because the use of them by any other person than the person directed by the mark would be a false representation to the public. But it must be borne in mind that a name, though originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person. . . . In the present case it appears to me to be clear that the brand introduced by the original partnership in 1836, and which has ever since been used, consisting of the letters B. B. H. surmounted by a crown, has become and now is a mere trade-mark or symbol, and is no longer regarded or passes current in the market (if it ever did) as a guaranty or representation that the goods so marked are the manufacture of the original partnership of Bradley, Barrows & Hall. If it were not so, the firm of Hall & Barrows would not be entitled to use these initials, which they have done as a matter of right, and this case must be determined upon the

If, however, the trade-mark is of a general nature, indicating the place of manufacture or the business, or the character and quality of the goods upon which it is used, as being the same as that of the goods upon which it has always appeared, without being descriptive, it will be considered as property, and will be assignable with the business or factory or article.¹

2. *Trade-Mark not Assignable Apart from Business or Article.*—The general doctrine announced in the previous section imposes an absolute prohibition upon the assignment of a trade-mark, except for use in the same way, and for the same purpose as that for which the trade-mark in question was originally adopted. The trade-mark must always tell the truth, and tell the same truth. It can have but one meaning, and it must always truthfully represent that meaning to the public. The meaning of the trade-mark to the public will determine the question of how far such trade-mark is assignable. If it means that the personal skill of a particular individual was exercised in the manufacture or selection of the goods upon which it is used, then it cannot be assigned at all, because it can never be truthfully used by another.²

assumption that their partnership was so entitled."

In *Edleston v. Vick*, 23 Eng. L. & Eq. 51, Wood, V. C., said: "It is said that the Messrs. Taylor have retired, and they no longer manufacture these pins, the plaintiff having succeeded to their trade. That is so; and for the good-will and right to use the labels and machinery for stamping them, the plaintiff has paid £2,600. I do not think that the want of title to use the label, which was urged by the defendants against the plaintiff's application, can prevail. If the plaintiff, or those under whom he claims, has used the label continuously for a certain space of time, that is enough to enable him to prevent others from using it, and making a profit out of the reputation which the label has acquired in the market. But then it is said that the use of this label by the plaintiff is a fraud . . . because it holds out that the article is manufactured by Taylor, when it is, in point of fact, manufactured by the plaintiff, Taylor having ceased to have anything to do with the business. But to take the last point first, the firm of Taylor & Co. having originally made this article, and it being now made by the persons who have *bona fide* acquired the business, they are quite justified in using the name of the old firm. It would be going too far to say that this is a misrepresentation by the plaintiff,

when he only uses the name which he has bought the right to use."

1. In *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340, Daniels, J., said: "It is probably needless to add that the fact of the plaintiff deriving its right to use the wrapper by assignment from the successors of Kinney Brothers is sufficient to entitle it to the protection applied by the courts to cases of this description. This was so held in *Merry v. Hoopes*, 111 N. Y. 415."

In *Warren v. Warren Thread Co.*, 134 Mass. 247, Morton, C. J., said: "Whatever may be the law as to a trade-mark which is strictly personal, it is the settled law that the right to use a trade-mark in connection with the business in which it has been used is property which will be protected by the courts, and which may be sold and transferred. *Emerson v. Badger*, 101 Mass. 82; *Gilman v. Hunnewell*, 122 Mass. 139. In *Sohier v. Johnson*, 111 Mass. 238, the right to use such a trade-mark was recognized as property which would pass to an assignee, as an incident, under a transfer of the business and good-will."

2. In *Cotton v. Gillard*, 44 L. J. Ch. 90, Jessel, M. R., said: "This person became bankrupt. His trustee of course did not know the secret of the sauce any more than the man himself. But the trustee purported to sell to the plaintiffs . . . the trade-mark, that is, the right to affix the words 'Licensed

If, on the other hand, it means that the goods are the product of a particular establishment or spring, into which the location enters as an essential element, then the mark can only be assigned together with the particular establishment, spring, or other local business.¹

Victualler's Relish' to something. But to what? To the thing sold, I suppose, because it is the trade-mark of something; but they seemed to have thought they could purchase a trade-mark generally, and a right to affix it to anything they chose to manufacture that might be somewhat similar in taste to the thing of which they did not know the composition; so as to induce the public to believe that the thing they were selling with a similar label was the real thing. . . . He consequently had no right to use the labels except by license from the defendant."

In *Mattingly v. Stone* (Ky. 1889), 12 S. W. Rep. 467, Holt, J., said: "Between the time of the sale of the distillery by Stone to Mattingly & Lancaster and the making of the contract of March 10th, 1882, Stone became a bankrupt. It is therefore urged that, if the right to use his name, as a part of the whisky brand, did not pass with the sale of the distillery, then it passed to his assignee in bankruptcy; and there was, therefore, no consideration for the contract of March 10th, 1882. It will be noticed that the words composing the brand, save the name of the appellee, are those of common use; and the right of using his name merely was a personal one to the appellee, and did not, therefore, pass to his assignee, any more than would the skill acquired by a merchant from experience in his business. *Helmhold v. Helmhold Mfg. Co.*, 17 Am. L. Reg. N. S. 169."

1. *Ainsworth v. Walmesley*, L. R., 1 Eq. 518; *Dant v. Head*, 90 Ky. 255; *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340; *Warren v. Warren Thread Co.*, 134 Mass. 247; In *Kidd v. Johnson*, 100 U. S. 617, Field, J., said: "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manu-

factured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of a trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer. Such is the purport of the language of Lord Cramworth in the case of *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. N. S. 513. See also *Ainsworth v. Walmesley*, 44 L. J. 355, and *Hall v. Barrows*, 10 Jur. N. S. 55."

In *Chadwick v. Covell*, 151 Mass. 190, Holmes, J., said: "What is the plaintiff's position when she seeks to prevent the defendant from selling his medicine by the name of 'Dr. Spencer's Queen of Pain'? She is not Dr. Spencer. She is not the owner of a manufactory once owned by him. She makes the medicine with her own ingredients, tools, plant, and contrivances. She has no exclusive right to make it. The defendant's use of the name does not mislead the public any more than hers does as to the maker, the place of manufacture, or the nature or quality of the goods. Unless, therefore, it should be held that a trade-mark may be erected into a new species of property, capable of lasting as long as the world does, and certain goods are manufactured, and of being transferred for value or by gift from person to person irrespective of goodwill, special right to make the goods, place of manufacture, or fraud of any kind upon the public, the plaintiff cannot prevail. . . . If the nature and foundation of the right is what we suppose, then the reason why, and the limits within which, a grantee will be protected, are plain. The most usual case is when a trade-mark means that goods come from a certain manufactory and the manufactory and mark change hands together; *e. g.*, *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep.

If it means that the goods are of the same character and quality as have been theretofore produced by a particular person, firm or corporation, where the element of personal skill does not enter, but only that of honesty and fair dealings, the mark may be assigned together with the business and the right to make the article or articles to which the mark has been applied; but such a transfer does not necessarily involve a transfer of the exclusive right to manufacture the article in question.¹

149; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Kidd v. Johnson*, 100 U. S. 617, 620. The use of the mark by a third person would be as much a fraud upon the grantee as it would have been upon his grantor; therefore the grantee will be protected. *Singer Mfg. Co. v. Loog*, 8 App. Cas. 17; *Jenning v. Johnson*, 37 Fed. Rep. 364. But our decisions have gone no further. *Sohier v. Johnson*, 111 Mass. 238. See *Cotton v. Gillard*, 44 L. J. Ch. 90; *Congress, etc., Spring Co. v. High Rock, etc.*, *Spring Co.*, 45 N. Y. 302; 6 Am. Rep. 82; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. 339."

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113, *Colt, J.*, said: "There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright; but in connection with the article produced, it may be bought and sold like other property. It constitutes a part of partnership assets, and is property sold with the firm property. *Browne on Trade-Marks*, §§ 360, 361; *Hall v. Barrows*, 10 Jur. N. S. 55; *Ainsworth v. Walmsley*, 44 L. J. 252; *Kidd v. Johnson*, 100 U. S. 617; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Congress, etc., Spring Co. v. High Rock, etc.*, *Spring Co.*, 57 Barb. (N. Y.) 526; 4 Am. Law. T. 168; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321."

In *Walton v. Crowley*, 3 Blatchf. (U. S.) 440, *Betts, J.*, said: "Bills of this description are not maintainable upon the ground that the plaintiff has a right of property in the trade-mark. The relief is given because the mark is a sign or representation, importing, and so understood and acted upon by the public, that the article to which it is attached is the manufacture or production which is generally known in

market under that denomination. *Coffee v. Brunton*, 4 McLean (U. S.), 516. The owner of the goods which bear the indicia is considered to be prejudiced in his interests if others can be permitted to come into the market with the same representation, and thus delude purchasers by vending inferior articles, or diminish the owner's business by acquiring sales to themselves under color of his reputation. The party, then, whose interests are directly affected by the wrong, is entitled to proceed in his own name to procure its suppression; and the person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark, as the manufacturer himself. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 614; 42 Am. Dec. 114. The plaintiff was not the inventor of this label or trade-mark, nor the one who originally adopted it; but he is the assignee of it, and of the good-will of the trade. He stands, thus, in the same relation to the defendant as his assignor would, and whatever privilege the law accorded to *James Walton*, in the possession and use of the trade-mark, passed to and can be enjoyed by the plaintiff under the assignment."

1. In *Oakes v. Tonsmierre*, 49 Fed. Rep. 447, 4 Woods (U. S.) 547, *Bruce, D. J.*, said: "The case falls within another principle, which is that a name may be used as a mere adjective of description or quality, which the public do not understand as any warranty that the person whose name is used is the maker of the article; and in these cases the right to use the name may be sold with the right to manufacture and vend the goods without reference to the question as to what person or persons actually manufacture them." See also *Julian v. Hoosier Drill Co.*, 78 Ind. 498; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v.*

3. Assignment, What Constitutes—*a.* IN GENERAL.—Any writing or act of the parties from which the clear intention can be gathered to assign an assignable trade-mark or a business with which it is inseparably connected, will suffice to pass title: as, for example, a writing signed by the parties, expressly mentioning the trade-marks, or a writing transferring the whole property in a particular business in which the trade-marks have been used, without mentioning the trade-marks, or a sale of the business by the sheriff, or by a trustee in insolvency, or by the parties who are owners, by simply delivering possession to a purchaser without mention of trade-marks. In these cases care must be taken to distinguish between a sale of a factory, or a business, and of an exclusive right to manufacture a particular article.

The sale of a factory will not carry the right to trade-marks used upon goods made therein, unless the trade-marks necessarily designate the particular factory as the place of origin, and the factory is associated in the mind of the public with the trade-mark. The factory might be entirely severed from the business, while the business was held intact and conducted elsewhere, in

Billings, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; Croft v. Day, 7 Beav. 84.

In *Huwer v. Dannenboffer*, 82 N. Y. 499; 72 P. & S., Am. Trade-Mark Cases, Earl, J.: "There was no finding and no evidence that the defendants intended by their sale to the plaintiff to divest themselves of their property in this trade-mark. This property did not pass as incident to what was sold. It was no necessary part of what was sold. The trade-mark was not in its nature local. It did not import that the goods upon which it was placed were manufactured or produced in any particular locality. It could truthfully be used upon goods manufactured anywhere, and in these respects it was unlike the trade-mark under consideration in the case of *Congress, etc., Spring Co. v. High Rock, etc.*, Spring Co., 45 N. Y. 291; 6 Am. Rep. 82. Under the circumstances of this case, it was incumbent upon the plaintiff to show that the exclusive right to use the trade-mark was actually, by agreement, vested in him, and this he failed to show."

In *Carmichel v. Latimer*, 11 R. I. 395; 23 Am. Rep. 481, Durfee, C. J., said: "I think, however, there is little reason to doubt that purchasers who are looking for Stillman & Co.'s linseys get what they are looking for when they get the linseys manufactured by the plaintiffs. The firm of Stillman & Co. has ceased to exist, and, conse-

quently, Stillman & Co.'s linseys, manufactured by Stillman & Co., can no longer be procured; but the plaintiffs are their successors, by purchase, in the use of their firm name, and continue the same manufacture with improvement, and, therefore, I am reluctant to hold, that a continuance of the old name upon their labels is intrinsically any fraud upon the public, who are interested to get the same or a better manufacture, but who, so long as they do get it, can have little care whether it comes from the original manufacturers or their successors. And see *Edleston v. Vick*, 18 Jur. 7; *Fulton v. Sellers*, 4 Brew. (Pa.) 42; *Dale v. Smithson*, 12 Abb. Pr. (N. Y. C. Pl.) 237; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321."

In *Congress, etc., Spring Co. v. High Rock, etc.*, Spring Co., 45 N. Y. 291; 6 Am. Rep. 82, Folger, J., said: "A property in trade-mark may be obtained by transfer from him who has made the primary acquisition; though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade-mark has been attached. Upon on Trade-Marks 52. And it may also pass, by operation of law, to any one who, at the same time, takes that right. *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 335. And see *Brooks v. Gibson*, 34 Beav. 566."

which case the sale of the factory would not affect the ownership of the trade-marks.

If the trade-mark be one which is used to designate the origin and ownership of all the classes of goods made and sold by a particular manufacturer, the sale of the business will carry the trade-mark. If the trade-mark be used to designate only one article, then the sale of the right to manufacture that article is necessary to carry the trade-mark.

b. ACT OF PARTIES.—An assignment in writing signed by the parties, owners of the trade-marks, transferring the factory, business and trade-marks, or business without mention of trade-marks, or the exclusive right to make and sell a particular article without mention of trade-marks, will pass the title to the trade-marks and give to the assignee the right to manufacture the same article or articles formerly sold under the trade-mark, and to mark them with the same trade-mark, provided in doing so no misrepresentation is made with reference to the real origin and ownership of the goods.¹ If a trade-mark says to the public, "The article on which I appear is made by John Smith at Philadelphia, *Pennsylvania*," the use of this same trade-mark by an assignee, without appropriate words indicating that fact, will be a falsehood and a fraud upon the public, and a court of equity will not support a trade-mark so used. An assignee should always accompany the trade-mark, when used by him, by words appropriate to convey to the public, the knowledge that the trade-mark is employed to indicate that the goods on which it appears are of the same kind and quality as were formerly made by the adopter of the trade-mark, but are now made and sold by his assignee.²

1. See *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 15 N. Y. Supp. 249; 60 Hun (N. Y.) 83.

In *Merry v. Hoopes*, 111 N. Y. 415, Peckham, J., said: "If the brands in question were trade-marks, so that they indicated that the iron upon which they were placed was of the manufacture of the plaintiff, or of the firm of which he had been a member, or that it had been galvanized by him or his firm, or specially sold by him or them, we think the right to exclusively use them on iron galvanized by the plaintiff, passed to him by virtue of the written papers signed by the parties at the time of the dissolution."

2. In *Symonds v. Jones*, 82 Me. 302, Emery, J., said: "We think, however, it is the duty of the complainants to the respondent, as well as to the public, to refrain from using the labels in such manner and form, as might lead the public to suppose that the goods packed by them were packed by the re-

spondent. They should strike from their letter-heads, circulars, and labels any words indicating that the goods were prepared by John Winslow Jones, and, if they use his name, should add such words as clearly indicate that the goods are not prepared by him, but by them as his successors."

In *Stachelberg v. Ponce*, 23 Fed. Rep. 430; 152 P. & S., Am. Trade-Mark Cases, Colt, J., said: "Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indicate in the use of the trade-mark that he is assignee or purchaser. *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588. Otherwise the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor. If these complainants have any right of action against the defendant, it is upon the ground that, by copying the trade-mark, 'La Normandi,' in substance, he

is misleading the public by false representations into the purchase of his cigars as those made by A. Bijur, the original proprietor of the trade-mark. Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 311. The supreme court, in Manhattan Medicine Co. v. Wood, 108 U. S. 218, declare that, the object of a trade-mark being to indicate by its meaning and association the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use, otherwise a deception would be practised upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer."

In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; 53 P. & S., Am. Trade-Mark Cases, Daly, C. J., said: "In *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588, it was held, that every assignee or purchaser who uses the trade mark of the original proprietor without indicating that he is the assignee or purchaser, practises an imposition upon the public. 'I do not deny,' says Chief Justice Wilson, in delivering the opinion of the court, 'that the right to use the trade-mark of the original proprietor passes with the good-will, by operation of law, to the executor and to the assignee of a bankrupt, and that it may pass to an assignee by express agreement between the parties; but I insist that in such cases, in order to receive the aid of a court of equity, the parties must add to the original trade-mark words indicating the authority for, and the right to its use, as executor, assignee or successor of the original proprietor, as the case may be. Assignees of trade-marks have no special privilege of sailing under false colors, and if they will persist in doing so, prudence would dictate that they give courts of equity a wide berth.' . . . My conclusion in this case is, . . . that those who have acquired through the sale under the assignee, and by subsequent conveyances, all that remained of the assets, interests, rights or property of the insolvent firm of *Hegeman & Co.*, have the right to use that business, and the trade-mark with it, if they so use it as to express the fact that they are successors to, and not the original firm. That if they abandon

their present mode of styling themselves *Hegeman & Co.*, and upon their signs, labels, stamps, advertisements, etc., etc., declare themselves to be, what they really are, successors to *Hegeman & Co.*, they will be entitled to the equitable aid of the court to restrain J. Nevin *Hegeman* and *Ferrier* from holding out to the public that the business they are carrying on is a continuation of that of the old firm, and of making use of its trade-mark, business name, etc., to the detriment of those who have acquired whatever interest there is in the trade-mark and name."

In *Fulton v. Sellers*, 4 Brew. (Pa.) 42, Strong, J., said: "It is also the obvious meaning of the agreement between Dr. *Lindsay* and the plaintiff that the latter should acquire thereby, not only the right to manufacture and sell the article or medicinal compound, but also whatever property the vendor had in the trade-mark. They were to have all the vendor's 'right, title, and interest in the article known as J. M. *Lindsay's Blood-Searcher*,' and a right to take his name and all his interest, so far as is necessary, 'to the successful and perfect preparation of the above-named Blood-Searcher for market and sale.' The vendor also covenanted 'not to offer or sell any interest in it to any other party, and not to put up or cause to be put up, or sell any article similar to it which would be likely to interfere with the successful sale of the *Blood-Searcher*. The right to use his name and all his interest must include the right to the use of the trade-mark. That was an interest of the vendor, he had a property in the trade-mark. . . . Nor do we think the position tenable that the complainants are not entitled to relief because they are only assignees of the trade-mark, and use it without designating themselves assignees. We do not perceive how their using the mark after they bought it without giving notice that they are not the original owners of it, can be a fraud upon the public, of which the defendant can avail himself. A trade-mark, like the good-will of a store or manufacturing establishment, is a subject of commerce, and it has many times been held entitled to protection at the suit of vendees."

"A trade-mark should not be protected in the hands of an executor, assignee, or other person claiming through its first adopter, unless such person

c. OPERATION OF LAW.—Whenever a trade-mark does not indicate the personal skill of an individual, but a particular house or stage-line, etc., or that the goods upon which it has been used are made at a particular establishment in the way usually employed there, or are the product of a particular business house, or are of a specific character and quality either known or believed to be peculiar, and indicated by the trade-mark, the sale and transfer of the house, stage-line, etc., factory, business, good-will, all assets, or exclusive right to make and sell the particular article, will necessarily carry with it by operation of law the exclusive right to use the trade name or trade-mark, for the reason, that he who owns the theater, hotel, factory, stage-line, steamboat-line, business, or the exclusive right to make the goods, is the only person who can state truthfully the particular facts formerly stated by the trade-mark, hence, he must necessarily have the exclusive right to use the trade-mark for this purpose.¹

added to it words indicative of the relation between himself and the first adopter of the mark, since otherwise a fraud would be committed on the public." *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588; *Cox's Man. of Trade-Mark Cases* 263.

See *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278.

1. See *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 40 Ill. App. 430.

In *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 15 N. Y. Supp. 249; 60 Hun (N. Y.) 583, *Daniels, J.*, said: "The facts supporting the conclusion that the label or trade-mark was intended to and did pass as an incident to the property itself, are certainly as cogent as they were in *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82, and there it was held that by purchasing the property supplying the water, with the right to proceed with the business, the plaintiff acquired the right to the trade-mark, 'to designate the article upon which this business was carried on.' *Id.* 302. And it is further sustained by *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169; *Kidd v. Johnson*, 100 U. S. 617; *Pepper v. Labrot*, 8 Fed. Rep. 29; and *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217."

In *Symonds v. Jones*, 82 Me. 302, *Emery, J.*, said: "What is known as the 'good-will' of the business is recognized by the law as a proper subject of sale or contract, in connection with a transfer of a business plant. An established business, with plants and products well known to the trade, has a

money value often far above that of its mere plant, and this is often the controlling motive for the purchase. Labels, trade-marks, particular words and phrases devised or used to distinguish or identify the product of the plant, and associated with such products in the public mind, are in like manner usually transferred with the plant, and are regarded as valuable acquisitions for the purchaser. They are, equally with the good-will, proper subjects of such sale and contract. The name or initials of the originator or owner of the business, when used on labels and as trade-marks in the business, may thereby have a value and so may be included in a sale of the business, so far, at least, as to prevent the vendor afterwards using them in like manner on other similar products to the detriment of his vendee."

In *Merry v. Hoopes*, 111 N. Y. 415, *Peckham, J.*, said: "They were brands which had been designed by the plaintiff while a member of the firm of *John Merry & Co.*, and had been used by that firm, and we think had passed to the firm composed of the plaintiff and the defendant's testator. Although the words 'good-will' were not mentioned in the papers (other than in Exhibit F, which was not signed by the parties, and which the defendant does not recollect even to have seen), yet it is evident, from an inspection of the papers which were signed by him, that it was meant to pass, and when defendant denies it, he merely denies a conclusion of law, as the intention to pass it is derived from the documents signed

by the parties. *Shipwright v. Clements*, 19 W. R. 599; *Hudson v. Osborne*, 18 W. R. Ch. Dig. 44, paragraph 15; 39 L. J. R., N. S. 79. The effect of the transaction between the parties, as evidenced in the papers executed by them, was a sale of the business, its good-will and its trade-marks, to the plaintiff by the defendants' testator."

In *Hill v. Lockwood*, 32 Fed. Rep. 389, Dyer, J., said: "There are trade-marks to which the characteristic of personal proprietorship attaches, because they assert to the public that some particular person has given his special skill to the production or selection of the articles they cover. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 II. L. Cas. 544; *Hoxie v. Chaney*, 143 Mass. 593; 58 Am. Rep. 149; *Holt v. Menendez*, 23 Fed. Rep. 869. There is another class of trade-marks, which assert for the articles they designate some particular place of origin. In such case the trade-mark is inseparable from the place. It passes as an incident with the sale of the place. *Congress, etc., Spring Co. v. High Rock, etc.*, Spring Co., 45 N. Y. 302; 6 Am. Rep. 82; *Matter of Swezey*, 62 How. Pr. (N. Y. C. Pl.) 219; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 218."

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113, Colt, J., said: "There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright; but in connection with the article produced it may be bought and sold like other property. It constitutes a part of partnership assets, and is properly sold with the firm property. *Browne on Trade-Marks*, §§ 360, 361; *Hall v. Barrows*, 10 Jur. N. S. 55; *Ainsworth v. Walmesley*, 44 L. J. 252; *Kidd v. Johnson*, 100 U. S. 617; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Congress, etc., Spring Co. v. High Rock, etc.*, Spring Co., 57 Barb. (N. Y.) 526; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321."

In *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217, Wallace, J., said: "The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and

sell the commodity which it has been appropriated to designate as the production or article of the proprietor. It may be abandoned if the business of the proprietor is abandoned. It may become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment, rather than of the proprietor. A trade-mark of this description is of no value to the original proprietor, because he could not use it without deception, and therefore would not be protected in its exclusive enjoyment. Such a trade-mark would seem to be an incident to the business of the place or establishment to which it owes its origin, and without which it can have no independent existence. It should be deemed to pass with a transfer of the business because such an implication is consistent with the character of the transaction and the presumable intention of the parties. *Dixon Crucible Co. v. Guggenheim*, 3 Am. L. T. 228; *Hudson v. Osborne*, 39 L. T. Ch. 79; *Shipwright v. Clements*, 19 W. R. 599."

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113; 133 P. & S., Am. Trade-Mark Cases, Colt, J., said: "If a trade-mark is an asset, and it is, there is no reason why it should not pass under the term 'assets' in an instrument which conveys the entire partnership property. To hold that the trade-mark is not included in this mortgage, is to say that the most valuable part of the partnership property is not covered by the words 'assets and effects of every kind and nature.'"

In *Pepper v. Labrot*, 8 Fed. Rep. 29; 83 P. & S., Am. Trade-Mark Cases, Matthews, C. J., said: "That distillery having now become the property of the defendants by purchase from the complainants, can they be denied the right of using the name by which it was previously known in the prosecution of the business of operating it, and of describing the whisky made by them as its product? Can the complainant be permitted to use the brand or mark formerly employed by him, to represent whisky made by him elsewhere as the actual product of this distillery? Both these questions, in our opinion, must be answered in the negative. . . . It is a fair inference from these authorities that when, as in the present case, the

trade-mark consists merely in the name of the establishment itself where the manufacture is carried on, and becomes attached to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it had previously acquired, in connection with his own manufacture at the same place of a similar article, by operation of law. For that proposition, the case of Congress, etc., *Spring Co. v. High Rock, etc.*, 45 N. Y. 291; 6 Am. Rep. 82, is a direct authority. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 229; 19 Am. Rep. 278; *Carmichel v. Latimer*, 11 R. I. 407; 23 Am. Rep. 481; *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169; *Julian v. Hoosier Drill Co.*, 78 Ind. 498; 91 P. & S., Am. Trade-Mark Cases; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Croft v. Day*, 7 Beav. 84; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; 53 P. & S., Am. Trade-Mark Cases."

In *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1; 17 P. & S., Am. Trade-Mark Cases, *Westbrook, J.*, said: "When the co-partnership between the plaintiffs and the defendant *Caswell* ended, in 1876, it is evident that the right to use the words 'Established 1780,' or 'Established A. D. 1780,' belonged to the business, and passed to the successors of the firm. . . . If the successor to the business of the manufacture of one compound or one article, has a right to the continued and sole use of the name or mark by which the public recognizes its genuineness, so the successors in business to those who placed upon the market many compounds, all marked and designated by certain well-known words, are entitled to the continued and sole use of such words which distinguished the preparations. And what is true in regard to articles manufactured by predecessors in business, and continued by successors, is also true in regard to new compounds. The fact that a business is a continuation of one long established, when communicated to the public, is of actual value to its owners. . . . Very clearly, a man's name could not be used by another, without the consent of its owner, to impose upon the public under that disguise, the business or

goods of the latter as those of the former. . . . Entertaining these views, which seem to me very simple and clear, if the question before me was new, I should find no difficulty in deciding that the successors in business to the old firm of *Caswell, Hazard & Co.* own, and are entitled to use, the words which distinguish both their general business and their specific preparations. Their right, however, so to do rests upon many cases. See, among others, *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 232; 19 Am. Rep. 278; *Sohier v. Johnson*, 111 Mass. 238; *Shipwright v. Clements*, 19 W. R. 599; *Dixon Crucible Co. v. Guggenheim*, 7 Phila. (Pa.) 408. . . . The property thus conveyed, and which the plaintiffs 'and their assigns' could have and hold 'forever,' included the signs upon the building containing the words 'Established A. D. 1780,' and the labels, bill-heads, letter-heads, etc., which contained similar language."

In *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169, *Van Brunt, J.*, said: "The plaintiff claiming that by the use of the name of 'Booth's theater' the public will be misled into believing that he is still the manager of this theater, and that they will be deceived into going to the theater, supposing that plaintiff still acts there, and that he will be injured thereby, brings this action to restrain the defendants from the use of the name of 'Booth's theater.' I am unable to see how the injunction asked can be granted. The plaintiff has built a public building and christened it 'Booth's theater.' He has acquired for that under that name a reputation as a place of public amusement. Having thus increased the value of the premises by that reputation, he has mortgaged and leased them under the name he had given them, and there is no doubt, from the manner in which the premises are described in the lease to *Junius B. Booth*, that one of the inducements to the lease was the public reputation which *Booth's theater* had acquired as a place of public amusement. The defendants have succeeded to all these rights, and one of them seems to me is the name by which the plaintiff has conveyed these premises. It is to be borne in mind that there is no attempt upon the part of the defendants to conceal the fact that they are the lessees and managers of this theater. What, under these circumstances, does the use

of the name 'Booth's theater' indicate to the public? Nothing more, I imagine, than that this theater was built by the plaintiff; that this is the theater which he named upon its construction 'Booth's theater,' and the place of amusement which had become known to the public under that name. . . . It seems to me that the plaintiff, by his acts, has affixed his name to the theater, so that his grantees and their successors have the right to call this building 'Booth's theater,' the name which he has given it."

In *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278, Dwight, C., said: "The case at bar, properly considered, is a species of 'good-will' analogous to a trade-mark. . . . It does not mean simply the advantage of occupying particular premises which have been occupied by a manufacturer, etc. It means every advantage, every positive advantage that has been acquired by a proprietor, in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business. . . . In other words, the name of the business could be severed from the place where it was transacted, and while thus separated could be treated as an object of property, so as to prevent third persons from attaching it to their business, and thus depriving the owners of a legitimate profit which they might reap elsewhere under the same name. It seems plain that if a banking-house had acquired a name, such as that of Baring Brothers, though there were no partner of the name of Baring, it would, on general principles of law, and independent of a statute preventing the use of fictitious names, have a property in such name, without reference to the particular place where the business was carried on. Though the name might be inseparable from the business, it would be separable from the premises; so that the business might, for example, be carried on on the opposite side of the street. These doctrines find further support in *Partidge v. Menck*, 2 Barb. Ch. (N. Y.) 103; 47 Am. Dec. 281; *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394; *Howard v. Henriques*, 3 Sandf. (N. Y.) 725; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Christy v. Murphy*, 12 How. Pr. (N. Y. Su-

preme Ct.) 77; *Hudson v. Osborne*, 39 L. J. Ch. 79; and other cases in *Browne on Trade-Marks*, ch. 12."

In *Sohler v. Johnson*, 111 Mass. 238, Morton, J., said: "The plaintiffs contend that the trade-mark was a property incident and attached to the 'Provision and Soap and Candle Establishment 'at Cambridge,' but we do not think it can be regarded as a local trade-mark, attached as incident to the real estate at Cambridge. It is obvious that if the parties in interest had at any time seen fit to sell that real estate and continue the business at some other place, it would have had no effect upon the character or fitness or value of the trade-mark, but it would remain attached to the good-will and business, wherever carried on."

In *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82, Folger, J., said: "A property in trade-mark may be obtained by transfer from him who has made the primary acquisition; though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade-mark has been attached. Upton on Trade-Marks 52. And it may also pass, by operation of law, to any one who, at the same time, takes that right. *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 335. And see *Brooks v. Gibson*, 34 Beav. 566."

The plaintiffs purchased of the former proprietors the spring. They took the whole property in it. They thus obtained that which was the prime value of it—the exclusive right to preserve its water in bottles, as an article of merchandise, and the exclusive right to sell it when bottled. Thus they acquired the business of their predecessors; for the plaintiffs owning the spring, no one else could carry on the business. And, under the rules above stated, they acquired, by assignment or operation of law, the right to the trade-mark before that, in use to designate the article upon which this business was carried on. See also *Hall v. Barrows*, 10 Jur. N. S. 55."

In *Shipwright v. Clements*, 19 W. R. 599, Malins, V. C., said: "The sale of a business is a sale of the good-will. It is not necessary that the word 'good-will' should be continued. The defendant sold the business, and with it everything producing profit. His proposition that he is entitled to sell the 'Zingare bouquet,' after having

The sale by the sheriff, of a hotel, factory, stage-line, etc., or a business, or the exclusive right to make an article with which the trade-marks are necessarily associated, will operate to transfer the trade-marks, whether they are mentioned at the time of sale or not.¹ A distinction must be noted between technical trade-

disposed of the right to do so to the plaintiff, is untenable. In the sale of a business a trade-mark passes, whether specially mentioned or not. As the plaintiff desires the injunction, he is entitled to have it."

In *Mossop v. Mason*, 18 Grant Ch. (Up. Can.) 453; *Draper, C. J.*, said: "The name of the particular hotel would therefore be of value as connected with the good-will of the business carried on therein, and that passed to the respondents to the extent of the appellant's right to possession as tenant, which was only for two years."

In *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321; *Paxson, J.*, said: "The true rule to be deduced from these cases would appear to be this: That the property or right to a trade-mark may pass by an assignment or by operation of law, to anyone who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives." See *Samuel v. Berger*, 4 Abb. Pr. (N. Y. Supreme Ct.) 88; 24 Barb. (N. Y.) 163; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281; 1 How. App. Cas. (N. Y.) 547; *Howe v. Searing*, 10 Abb. Pr. (N. Y. Super. Ct.) 264; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Bury v. Bedford*, 33 L. J. N. S. Ch. 465; *Cooper v. Hood*, 26 Beav. 293.

1. In *Milliken v. Dart*, 26 Hun (N. Y.) 24; *Davis, P. J.*, said: "That is, in substance, that the defendant Dart, one of the assignors, has, since the making of the assignment, used and claimed to own a trade-mark which should have been assigned. In respect of that it is enough to say, that if the trade-mark was assignable property, it is assigned by the assignment, and the title to it is wholly vested in the assignee. A subsequent use of it by Dart, under a claim that it is not as-

signable, is no evidence of a disposition of property with intent to defraud. If his claim be correct, the property is tangible and in reach of his creditors, and not disposed of. If the claim be not well founded, the assignee may take possession and dispose of it for the benefit of the creditors. It is, to say the least, a disputable question, whether property in a trade-mark is the subject of attachment or levy under execution. See *Hegeman v. Hegeman*, 8 Daly (N. Y.) 6."

In *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 453; *Westbrook, J.*, said: "It is not denied that Henry T. Helmbold could, by voluntary sale and assignment, transfer the right to use his knowledge and name, but it is not seen how the right to use his own knowledge and name can be taken from him by any judicial proceeding whatever. If they can be, then the merchant who has become unfortunate, but who has still a knowledge and a name with which to begin business anew, must, if he has been adjudged a bankrupt, be content to leave with his assets his brains and his character. . . . The property which he had acquired belongs to his creditors, but the name and whatever of character, good or bad, belonging to it, and which he has himself made, are his, and must so continue to be until he voluntarily parts with them. He has the right to make any extract he pleases, and to tell the public by the use of his own name that the preparation is his, and not that of another, and neither the plaintiff nor any other person can place that name upon a preparation not his, against his will, and deprive him of the use thereof."

In *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Dwight, C.*, said: "A trade-mark, or a designation of one's trade, may thus be sold by order of the court, whether it be attached to a new business or to one long existing. In such case, 'good-will' and trade-marks are governed by similar rules. In *Bradbury v. Dickens*, 27 Beav. 53, on the dissolution of a partnership, the title of a magazine, 'House-

marks and the proper names of individuals; the former will as a general rule pass; the latter will not, without express contract.¹

hold Words,' was, by order of the court, put up at auction and sold. The court said that property in a literary periodical like this is confined purely to the mere title, and that forms part of the partnership assets and must be sold for the benefit of the partners, if of any value. The decree ordered the sale of the right to use the name of the periodical and the right to publish under the same name and title, any periodical or other work, whether in continuance of said periodical called 'Household Words,' or otherwise, as the purchaser might think fit."

1. In *Hazelton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 494, Dailey, C. J., said: "All the witnesses agree that in the negotiations which led to the execution of said assignment, no mention whatever was made of the subject of trade-marks, trade names, or the good-will of the business as a portion of the assets within the contemplation of the parties. None of these matters were discussed or apparently thought of, and the present contention is based solely upon the claim that the term 'assets' of said business is sufficiently broad to include all possible property rights to which Hazelton, as a member of said firm, was in any way entitled, and so must be deemed to have included trade-marks and trade names, if the firm, as a matter of fact, had, up to that time, become entitled to any such. . . . The transfer of the exclusive right to the use of said name is sought to be made out from the mere fact that said instrument assigned all the assignor's interest in the assets of the business, and trade-marks and trade names, if such there were, are claimed to have been a part of the assets assigned. The right of a man to use his own name in connection with his own business is so fundamental that an intention to entirely divest himself of such right and transfer it to another will not readily be presumed, but must be clearly shown. Where it is so shown, the transaction will be upheld. But it will not be sustained upon doubtful or uncertain proof. All the circumstances surrounding the execution by Hazelton of the assignment of his interest in the business tend to negative the assumption that any property in a trade-mark or a trade name was within the

contemplation of the parties, and the evidence, to say the least, leaves it doubtful whether the firm, at the time said assignment was made, had any property rights of that character. We therefore think that the intention on the part of Hazelton to divest himself of the right to use his own name in any business in which he might see proper to engage, is not shown with such clearness and certainty as would justify the courts in undertaking to enforce it."

In *Thyme v. Shove*, 45 Ch. Div. 577, Stirling, J., said: "This, then, is a case in which upon the sale of the business there was no express assignment of the right to use the name of the former owner of it. . . . He has assigned the good-will of his business to the defendant; and by virtue of that assignment the defendant, in carrying on the business, has the right to use the name of the assignor for the purpose of showing that the business is the business formerly carried on by the assignor; and he has the full right so to use it, subject to this: that he must not exercise that right so as to expose the assignor to any liability by holding him out to be the real owner of the business. That is the only limit of the defendant's right to use the plaintiff's name."

In *Mattingly v. Stone* (Ky. 1890), 14 S. W. Rep. 47, Holt, J., said: "A trade-mark proper is of value, and a subject of commerce. It therefore passes to the assignee of a bankrupt owner. But a distinction is to be taken, it seems to us, between such a case, and the use of a person's name, merely, which may be valuable on account of his honesty or skill. He may, by voluntary sale or transfer, assign the right to use his knowledge or name; but we are at a loss to know how his right to use them can be taken from him by a judicial proceeding. They remain to the bankrupt as his capital for a new beginning."

In *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147, Mulkey, J., said: "The principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he cannot afterwards resume it in carrying on the same business. *Gillis v. Hall*, Cox's Am. Trade-Mark Cases 596; *Witt v. Corcoran*, Cox

Man. 423; *Charton v. Douglas*, Cox Man. 172; *Ayer v. Hall*, 3 Brew. (Pa.) 509; *Probasco v. Bouyon*, 1 Mo. App. 241; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440."

In *Levy v. Walker*, 10 Ch. Div. 436, Hall, V. C., said: "It seems to me that the question whether 'good-will' does ordinarily include the right to use the name of a living person, should receive one general answer, viz.: that it does not."

In *Scott v. Rowland*, 20 W. R. 508, Wickens, V. C., said: "That even assuming the good-will had been effectually assigned to the defendant, it would be a question whether that would give him the right of using the plaintiff's name; as expressed in *Churton v. Douglas*, Johns. 174."

In *Hudson v. Osborne*, 39 L. J. Ch. 79, James, V. C., said: "It has been settled that there is no implied covenant of any kind in the sale by an individual himself of the good-will of his business; but it seems to be settled that a trader, whose business and the good-will of whose business has been sold by himself or by any person deriving title under him, has no right to represent himself as carrying on that identical business; he has no right to use the trade-marks, which were the marks of that business, or by the use of the name, or of a title of the firm, to represent himself as being the continuer of that identical business which was sold. I think that a man, who has sold the house which is known as Osborne House, and the business which is known as the Osborne House business, has no right to resume that name, which can only be resumed for the purpose of deceiving the public into the belief that his present business is the same business as his former one. He has no right to use the words 'Osborne House.' I think that hardly lies in the mouth of these defendants to say, it was their own name; the house was sold; if Osborne had sold it himself, with the brass plate, then I don't think he would have had a right to complain of the continuance of the ornaments of the house, and there was no obligation on the part of the purchaser to remove that brass plate with the word 'Osborne' upon it. It could not have been done without some expense, and it is not by any means an uncommon thing for persons buying a business to continue the name they find there."

In *Howe v. Searing*, 10 Abb. Pr. (N. Y. Super. Ct.) 264, Hoffman, J., said: "The first and the most important question in the cause is, what right passed to Baker, under the sale and transfer to him, in January, 1852, of the leasehold premises, stock, and trade, with the 'good-will of the business of baking, now or heretofore carried on by me in the city of New York.' The authorities referred to, do in general describe the good-will of a trade 'as a probability that the old customers will resort to the old place.' . . . The judgment in *Crutwell v. Lye*, 17 Ves. 346, distinctly admits, that, although you may set up a similar business, you are not entitled, when you have sold the good-will of the business, to represent that you are continuing the identical business; not to say that you are the owner of that which you have sold." In the foregoing case it was said by Moncrief, J., *dissenting*: "Whether or not the term 'good-will,' under all circumstances, includes the name under which the business originated or was continued, or became a thing of specific value, is not in the present instance necessary to determine. . . . The plaintiff adopted, appropriated, and used the words or name 'Howe's Bakery,' and by that name his establishment became known, and was extensively patronized, and was a thing having specific value. The plaintiff so avers in his complaint. . . . The name or words, 'Howe's Bakery,' was nothing but a trade-mark, and as such, is now sought to be protected by the plaintiff. The name or trade-mark passed by the assignment and transfer of the 'good-will,' and if it was not the thing itself, it was an integral part of it."

In *Churton v. Douglas*, 1 Johns. 174; 28 L. J. Ch. 841, Wood, V. C., said: "There are cases every day in this court with regard to the use of the name of a particular firm, connected generally, no doubt, with the question of trade-mark. But the question of trade-mark is in fact the same question. The firm stamps its name on the articles. It stamps the name on each article, as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. And when you are parting with the good-will of a business, you mean to part with all that good disposition

4. **Assignment for Benefit of Creditors.**—A general assignment for the benefit of creditors of all the assets of a trade-mark owner, will operate to transfer the trade-marks, provided they are not of such a personal nature as to be inseparably attached to the owner, and necessarily indicate his personality and skill, and provided, also, that the business which comes into the hands of the assignee can be sold as a going business, so that the trade-mark may be used by the purchaser to indicate to the public the same facts as formerly. But the trade-mark cannot be sold as an abstract right disassociated from any particular business or goods.¹

which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put it anything short of that. That the name is an important part of the good-will of a business is obvious, when we consider that there are at this moment large banking firms, and brewing firms, and others, in this metropolis, which do not contain a single member of the individual name exposed in the firm. That being so, it appears to me that, when the defendant parted with the good-will of this business to the plaintiffs, he handed over to them all the benefit that might be derived from holding themselves, not as the persons interested in that particular business, which business had been identified as being carried on by the particular firm. When once that sale had taken place, no person other than the plaintiffs could have any right to describe himself as 'late John Douglas & Co.' Certainly the defendant could have no such right. The name of the firm, 'John Douglas & Co.,' had become a name well known. The business was identified by that name. And the defendant, having assigned all his share in the good-will of the business identified as that formerly carried on by John Douglas & Co., was not entitled to represent himself to the world as carrying on that business. He parted with all right so to represent himself when he sold all his share in the good-will. It is not as if he were calling himself 'John Douglas' alone, and carrying on a similar business under that name, and endeavoring to attract the custom to himself under that name by his own ability; but he represents himself as carrying on the identical business; and by so doing he is attracting to himself that custom which emphatically must be meant by the

term 'good-will,' namely, the custom which is drawn to the business, in the belief that it is in continuation of the business established under the name of John Douglas & Co. The constant repetition, on the outside of shops, of the words 'old established business,' 'established in such and such a year,' and the like, shows there is a considerable degree of attraction in a long-continued firm. And the words now in question, 'late John Douglas & Co.,' amount in effect to a declaration, 'This is the business established so long ago under the firm of "John Douglas & Co.," and we are the persons who carry on that business.'

1. In *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, Cassoday, J., said: "It is true that one of the functions of a trade-mark is to point out the true ownership of the goods or articles to which it is applied, and that the words 'Fish Bros.' and 'Fish Bros. & Co.' partially ceased to perform that office when Mr. Case became the ostensible owner or mortgagee, and still more so when the legal title passed to the receivers, respectively, and finally became extinct when the property and assets became vested in the plaintiff; but such extinction did not prevent those words from performing the two other functions of a trade-mark mentioned. . . . Upon the facts in this case, as found in the foregoing statement, and the law applicable, we are constrained to hold that the plaintiff acquired the good-will of the business, including the right to use the picture and words mentioned as trade-marks, notwithstanding they were not specifically named in any of the transfers or conveyances to the plaintiff. *Menendez v. Holt*, 128 U. S. 514. To the same effect, *Merry v. Hoopes*, 111 N. Y. 415; *In re Wellcome's Trade-Mark*, 32 Ch. Div. 213; *Hoxie v. Chaney*, 143 Mass. 592; 58

Am. Rep. 149; Witthaus v. Braun, 44 Md. 303; 22 Am. Rep. 44; Morgan v. Rogers, 19 Fed. Rep. 596."

In Warren v. Warren Thread Co., 134 Mass. 247, Morton, C. J., said: "The demurrer raises the question whether, notwithstanding the insolvency proceedings, the plaintiff retains the exclusive right to the use of the trade-marks. It is apparent upon inspection that these are not mere personal trade-marks, the use of which by any other person than the plaintiff would operate as a fraud upon the public. His name does not appear upon any of them except one, and in that it is a subordinate part of the trade-mark. They are all designs or symbols designating the place or the establishment at which the thread is manufactured, and not implying any peculiar personal skill in the plaintiff as the manufacturer, or importing necessarily that it is manufactured by him. . . . Upon the authorities, and upon principle, it is clear that, before his insolvency, the plaintiff had a property in his trade-marks which would be protected by the law, and which he had the right to sell and assign, at least in connection with his business and establishment. The insolvent law provides that 'the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed.' Gen. Sts., ch. 118, § 44. Under this statute, all the plaintiff's property which he could assign passed to his assignee. It includes, *ex vi termini*, his manufacturing establishment, machinery, tools and fixtures, manufactured goods, and the right to use the trade-marks in connection with the establishment and goods. It necessarily follows that he has no exclusive right to use these trade-marks, and no ground for maintaining this bill."

In Pepper v. Labrot, 8 Fed. Rep. 29, Matthews, C. J., said: "The complainant having, upon his own petition, been declared a bankrupt, filed the required schedule of his assets and liabilities, in which he described the tract of land inherited from his brother as including the 'Old Oscar Pepper Distillery;' and as such it was known at the time the title became vested in the defendants (who purchased from the assignee in bankruptcy). . . . Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51; Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 322. . . . Neither by

its own meaning, nor by association, does it indicate the personal origin or ownership of the article to which it is affixed. It does not seem to give notice who was the producer. It could be applied by him with truth, to his goods only while he was the owner of the distillery named, and then only, not to all whisky of his manufacture, but only to that actually produced at that distillery. It can now be used without practicing a deception upon the public only by the defendants. It points only at the place of production, not to the produce. If a trade-mark at all in any lawful sense, it is only in its use in connection with the article which it truthfully describes; that is, whisky which is actually manufactured at the Old Oscar Pepper Distillery, in Woodford county." See also Hall v. Barrows, 4 De G. J. & S. 157; Motley v. Downman, 3 Myl. & C. 1; Kidd v. Johnson, 100 U. S. 617.

In Matter of Swezey, 62 How. Pr. (N. Y. C. Pl.) 215, Van Hoesen, J., said: "The examination is, as I understand it, to ascertain whether or not certain property, called a trade-mark, belongs to the assigned estate. That can only be determined by learning the facts which give the trade-mark its value. If, as Chief Justice Daly said in the Hegeman case, this trade-mark is made valuable simply because the public believes that Dart's personal skill, experience, and peculiar knowledge impart to the fabric a perfection which it would not possess if made by any other person, it does not belong to the assigned estate. If, on the other hand, the trade-mark indicates a certain fineness or quality in the goods, and does not owe its value to the public belief in the peculiar skill of the manufacturer individually, it will be part of the assigned estate, and will go to those who buy the factory which has heretofore produced the fabric. . . . A trade-mark may be, and often is, transferred *in invitum* by proceedings in bankruptcy."

In Hudson v. Osborne, 39 L. J. Ch. 79, James, V. C., said: "I think this case is governed by the case of Churton v. Douglas, Johns. 174. I take it that in substance there is no distinction between a sale by a man himself of his business and the good-will of it, and the sale by the assignees in bankruptcy of all a bankrupt's assets of every kind. His business and the good-will of that business become vested in his

assignees, and could be properly sold by them for the purpose of making good, so far as those assets go, the debts which he owes to his creditors, and they have a right to sell everything which he himself could sell."

In *Bury v. Bedford*, 33 L. J. N. S. Ch. 465, Turner, L. J., said: "That whatever interest the defendant, John Bedford, had in the mark, or in the use of it (whether as partner during the continuance of the partnership, or during his life after its determination, or after the deaths of the partners, if, as contended on his part, he was then alone entitled to it), passed to the trustees under the creditors' deed, for by that deed, not only the joint estate of the partners, but the separate estate of each of them, was passed to the trustees."

In *Edleston v. Vick*, 23 Eng. L. & Eq. 51, Wood, V. C., said: "But, whether the plaintiff himself ever had any interest in the letters-patent or not, it appears that Taylor, when he left the concern, made over to his partner, Shuttleworth, along with the business, and included in the price, the right to use, not the patent by name, but the name of the business. Shuttleworth and Taylor had been joint owners of the letters-patent. Shuttleworth, under that assignment, carried on the business alone under the name of Taylor & Co., up to his bankruptcy in 1839. His assignees do the same thing for a time, and then they make over to the present plaintiff, for value, the right of carrying on the trade, and of using a variety of plates and engravings and drawings relating to the trade and trade-marks, and which were in the custody of the assignees; and the plaintiff has accordingly carried on such business and used the plates, etc., ever since, for a period of more than eleven years. He has, therefore, clearly established his right to this particular form of engraving upon the wrapper and the interior sheet."

In *Crutwell v. Lye*, 17 Ves. 336, Eldon, Lord Chancellor, said: "It is necessary first to consider, whether the sale under bankruptcy of lot No. 1, and the good-will belonging to those premises, or the trade established upon them, would, if there was nothing more, upon any principle, prevent the bankrupt's immediately, by the assistance of his friends, again setting up the trade from Bristol to London, by

the very same road; and I cannot say, that any of those interests, which a bankrupt is supposed to have by the effect of his certificate, or in the surplus of his estate, after payment of his debts, form a principle, upon which he should not be permitted to engage again in the like trade; which, in this sort of case, is materially distinguished from the same trade. In *Hogg v. Kirby*, the defendant's magazine, being published as a continuation of the plaintiff's, was the same. Supposing the bankrupt, therefore, not to have had any other interest, there is no principle upon which this court could hold, that he should not engage in the direct trade, by the same road. . . . The bankrupt advertises, that he is reinstated in the carrying business; and, though that expression may have a tendency to misconception, yet he is, in a fair sense, reinstated, if, being at liberty, he has availed himself of that situation to set up again that carrying business. It amounts to no more than that he asserts a right to set up this trade; and has set it up, as the like, but not the same, trade with that sold; taking only those means, which he had a right to take, to improve it; and there is no fact, amounting to fraud, upon the contract made with the plaintiff. The question whether, under the circumstances, the plaintiff is to carry the agreement into execution, if the assignees have taken from him actively the benefit of that contract, is very different; but, whatever opinion may be held upon this transaction, in that view of it, I do not see the fraud, upon which, as a judge in equity, I can lay my hand; and I dare not, from this place, so deal with it."

In *Longman v. Tripp*, 2 Bos. & P. N. R. 67, Sir James Mansfield, C. J., said: "As to the question, whether the right to this newspaper passed under the assignment, can any case be found in which it has been held, that property of this description would not pass under a commission of bankrupt? I remember a case before Lord Mansfield, in which the advantage of a news-walk was held to be assets upon a plea of *plene administravit*, and I dare say that such an interest has often been sold under commissions of bankrupt. If the interest in question did not vest in the assignees, then the right is not gone, and the sale of the assignees is of no consequence. Perhaps the reason why no case upon the subject is to be

5. **Succession by Inheritance.**—A trade-mark may pass by inheritance to the heirs at law of the original owner, provided they are his successors in business. The legal successor in business in any case will take the trade-mark, whether by survivorship among partners, or by transfer or succession of the business, by any legal method. The executors of a deceased trade-mark owner will also succeed to the right to employ the trade-marks, provided they continue to conduct the business formerly carried on by the owner of the marks, and in winding up the estate they may sell the business and transfer the marks with it, provided the marks are not of a personal nature, and are susceptible of being used by the successor without misrepresentation.¹

6. **License to Use Trade-Mark.**—As a general rule, a valid license cannot be granted for the use of a trade-mark. This rule is based upon the principle that a trade-mark must indicate the ownership and origin of the goods, and having once become associated with the product of an individual or person, to permit the use of the same mark by several persons, even by authority of the owner, would be to authorize a fraud and deception upon the public by representing goods made by the licensee as emanating from the original adopter of the mark. This rule, however, is not without exceptions. Thus, the manufacturer of a patented article, upon which a trade-mark is employed, in selling the patented article, gives an implied license to all subsequent purchasers to deal in the article itself and to sell it under the same trade-mark.

found, is because the point has never been doubted." And, in the same case, Rooke, J., said: "If the right which the bankrupt had in this paper were assignable by deed, it passed under the assignment of the commissioners."

1. In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1, Daly, C. J., said: "It has also been held, in several cases, that where a trade-mark or a name, or a trade-mark and name united, has been used and recognized, as denoting that the article is made at a particular establishment, the name used being that of the proprietor of the establishment, as 'Stilman's Mill' (*Carmichel v. Latimer*, 11 R. I. 409; 23 Am. Rep. 481), that those who succeed to the establishment, such as his heirs, next of kin, or his successors in interest, may, in carrying on the establishment thereafter, there being no statutory enactment to the contrary, continue to use the same name and trade-mark, without any reference to their derivative title, for nobody is thereby deceived, as they get the same article and from the same place as they got it before. *Witthaus v. Braun*, 44 Md. 303; 22

Am. Rep. 44; *Fulton v. Sellers*, 4 Brew. (Pa.) 22; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 542; *Carmichel v. Latimer*, 11 R. I. 409; 23 Am. Rep. 481; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 444."

In *Marshall v. Pinkham*, 52 Wis. 572; 38 Am. Rep. 756, Cassoday, J., said: "It is equally clear that any of the Marshall children, or any other person by the name of Marshall, having acquired a knowledge of the compound, had a perfect right to manufacture and sell it, by himself or others, in his own name, even against the protest of old Samuel Marshall, provided he did not do it in such way as to be likely to mislead ordinary purchasers, proceeding with ordinary caution, into the belief that they were purchasing the liniment manufactured and sold by old Samuel Marshall himself."

The name of a person, in connection with other marks, may form proper subject-matter for trade-mark registration by the business successors of such person. *Ex p. Frieberg*, 87 P. & S., Am. Trade-Mark Cases; 20 Pat. Off. Gaz. 1164.

In all cases where the good-will of a business is purchased, and the trade names or trade-marks are of a nature indicating the personality of the original founder of the business, the use of the marks by the purchaser will always be by the license of the original founder, and unless this is expressly made irrevocable by contract, it may be terminated at the will of the original founder of the business whose name is used in connection with it.¹

VIII. PARTNERSHIPS—1. Trade-Mark of Individual Entering Firm; Rights of Firm Therein.—The rights of a firm in the trade-marks of a member, which were held and employed by him before entering the firm, will, in great measure, be controlled by agreement. In the absence of express agreement, the rights of the firm in

In *Skinner v. Oakes*, 10 Mo. App. 45, Thompson, J., said: "A point is made in behalf of the defendant, Annie Oakes, that before the plaintiffs acquired the alleged right to use the name of Oakes in the manufacture of candles, she, by marrying with Oakes, had acquired a right to use his name in the same connection, of which the plaintiffs cannot lawfully deprive her. There is nothing in this point except novelty. Peter Oakes could not confer upon Annie McLaughlin, by marrying her, any higher rights in the use of his own name than he himself had. A son cannot acquire from his father the right to use his father's name as a trade-mark, if the father had parted with the right by contract (*Filkins v. Blackman*, 13 Blatchf. (U. S.) 440), and we do not see how a wife could stand in a better position as to the name of her husband."

In *Huwer v. Dannenhoffer*, 72 P. & S., Am. Trade-Mark Cases; 82 N. Y. 499, Earl, J., said: "A trade-mark is a specie of property which may be sold or transmitted by death with the business in which it has been used. *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137; 11 H. L. Cas. 523; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278."

See *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523.

1. Where a distiller sells his business and agrees that his name may be employed in connection therewith for a short period, the purchaser may, during such period, employ the name of the founder, but the license is terminable at the will of the founder. *Mattingly v. Stone* (Ky. 1890), 14 S. W. Rep. 47.

Where a license for the use of patents coupled with a trade-mark, in-

cludes a keeping of accurate accounts and the rendering of statements at specified periods, the fulfillment of these terms becomes a condition precedent to the existence of the license, and on breach the license is terminable. *Martha Washington, etc., Flour Co. v. Martien*, 44 Fed. Rep. 473.

A dealer in sewing machines, who has purchased old machines bearing the trade-mark of the manufacturer, will not be restrained from selling them with said mark. *Singer Mfg. Co. v. Bent*, 41 Fed. Rep. 214. See *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208.

In *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521, Daly, F. J., said: "The defendants were simply the servants of the company during the period covered by the agreement. The transfer of the wood-cuts to the latter was simply to enable them to place the labels upon the pomade manufactured by them under the company's supervision, and was not intended to, and did not, have the effect of transferring to the defendants any property in the trade-mark. In fact, the defendants by their own acts afterward acknowledged the company's continuing ownership and right to use the trade-mark."

So far as the object sought could be attained, it would operate to the plaintiffs' detriment by diminishing the sale of their articles in the market, and they are entitled to be protected by a court of equity from this attempt on the part of rivals to deprive them of the fruits of their industry or enterprise in making their own fabric known and recognizable by its distinctive trade-mark. There is a right of property in a trade-mark which is capable of being transferred to another, and the right and title

such a case will amount to nothing more than a license, revocable by the retirement of the owner of the marks from the firm.¹

2. Rights of Members of a Firm in the Trade-Marks of the Partnership.—The trade-marks adopted by the firm to designate the origin and ownership of its goods are partnership assets, and all the members are entitled to their use, and are interested in their value in proportion to their interest in the firm.²

3. Rights of Retiring Partner.—Where the trade-marks or trade names of a partnership consist of technical trade-marks or trade names other than the name of the retiring partner, and the retiring partner, either by express agreement or acquiescence, permits

which the company had to this trade-mark passed to the plaintiffs by the assignment."

1. In *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, Shipman, J., said: "When a partnership is formed in regard to the manufacture of the article to which the trade-mark is properly applied, 'the trade-mark of one partner, in the absence of special regulations, becomes part of the partnership property.' *Bury v. Bedford*, 10 Jur. N. S. 503."

In *Kidd v. Mills*, 5 Pat. Off. Gaz. 337, S. N. & H. Pike, when in partnership in Cincinnati under the firm name of "S. N. & H. Pike," adopted as trade-marks for whisky the words "Magnolia" and "Dave Jones." In 1854 H. Pike retired, and S. N. Pike carried on the business for several years, sometimes alone and sometimes in partnership with others. When in partnership with one Kidd, he sold the premises on which, and the apparatus, etc., with which, the business was carried on at Cincinnati, but which were his private property, to Mills, Johnson & Co., giving them at the same time what purported to be a license to use the brands used in the business. Mills, Johnson & Co. registered these brands as their trade-marks. Kidd & Co., a firm which consisted of Kidd and one other surviving partner of "S. N. Pike & Co.," applied for registration of the same marks. Interference was declared in order to try title. On these facts the commissioner decided that, "When Pike ceased the use of these trade-marks as an individual, and consented to their adoption and use by the firm of which he became a member, the right to the trade-mark passed to the firm." This case was practically reversed on this point by *Kidd v. Johnson*, 100 U. S. 617. The facts were the same as in the above case, but the

court, speaking through Mr. Justice Field, held that Pike "did not place his interest in the trade-mark in the concern as a part of its capital stock. He allowed the use of it on packages containing whisky manufactured by them; but it no more became partnership property from that fact than did the realty itself, which he also owned, and on which their business was conducted. He was engaged in the same business before the partnership as afterwards, and taking his clerks into partnership changed in no respects beyond its terms, their relation to his individual property. Their subsequent conduct, moreover, plainly shows that they claimed no interest in the trade-mark."

In *Bury v. Bedford*, 4 De. G. J. & S. 352, Turner, L. J., said: "This part of the case . . . rests, as it seems to me, upon the simple question whether, upon the formation of a partnership with a person entitled to the benefit of the trade-mark, the trade-mark does not, in the absence of express provisions in relation to it, become an asset of the partnership, and in my opinion it does, for the whole trade is carried into the partnership, and the trade-mark is but an element of the trade." This case is followed on this point in *Sohier v. Johnson*, 111 Mass. 238.

2. Where two persons associated in business for the manufacture and sale of a commodity (one having been the originator or inventor thereof), jointly adopted a trade-mark for it, they are equally entitled to its use after the dissolution of their connection; and this whether the arrangement constituted a partnership, or whether one was to receive a portion of the profits of the business as a salary, provided the trade-mark was adopted in conjunction. *Taylor v. Bottim*, 5 Sawyer (U. S.) 584.

the continued use of the trade-marks by the firm, he will be held to have abandoned all rights in them; but where the trade-mark or name consists of the personal name of the retiring partner, nothing short of an express agreement will deprive him of the right to use his own name in connection with a similar business, and as a general rule he can enjoin his former partners from the further use of his name in any manner which might involve him in liability for the debts or contracts of the firm or deceive the public.¹

1. In *Ward v. Ward* (Supreme Ct.), 15 N. Y. Supp. 913, defendant withdrew from plaintiff corporation and established the firm of Wm. H. Ward & Co., engaged in the same business. An injunction was asked to prevent defendants from stamping the words, "Marcus Ward's Son" on their goods, and the words, "Late of the firm of Marcus Ward & Co." The injunction was refused, the facts being that defendant was a son of Marcus Ward and was lately a member of said firm.

G., S. & B., partners in trade, carried on business under the firm name of "G., S. & B." B. sold his interest to G. The court said that, as there was no express agreement to assign the good-will, G. had no right to continue to use the name of B. by carrying on business under the old name. *Gray v. Smith*, 43 Ch. Div. 208. *Levy v. Walker*, 10 Ch. Div. 436, *disinguished*.

A copartnership, trading under the firm name of C. W. Dorr & Co., made an assignment for the benefit of creditors, and the assignee under order of court, sold the stock (including a number of wrappers, etc., marked with the name of the firm) to plaintiff corporation, which continued the business at the old stand. C. W. Dorr, of the old firm, organized another corporation under the old firm name. An injunction was refused on the ground that C. W. Dorr had a right to go into business in his own name, unless he misled the public or encroached on the rights of plaintiff. *Iowa Seed Co. v. Dorr*, 70 Iowa 481; 59 Am. Rep. 446.

A junior partner retiring from a firm retains no interest in a trade-mark used by the firm and originated by its senior member, particularly when the weight of evidence indicates that he released all rights to the brand. *Holt v. Menendez*, 128 U. S. 514, *affirming* 23 Fed. Rep. 869. Here Fuller, C. J., said: "It may be that where a

firm is dissolved and ceases to exist under the old name, each of the former partners would be allowed to obtain 'his share' in the good-will, so far as that might consist in the use of trade-marks, by continuing such use in the absence of stipulation to the contrary; but when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business, and the future conduct of the business by them under the old name, the good-will remains with the latter as of course."

Where one partner retires from a firm, and the other members of the firm, with the consent of the retiring member, continue the business under the old firm name, they will be held to have succeeded to the business of the old firm, and the trade-marks and trade name of the old firm. Where the facts show that the remaining partners took the legal statutory steps to perpetuate the old business as to successors, and the retiring partner permits them to carry it on as such under the old name, for two years, without objection, admitting them in sundry receipts to be "successors to the old firm," he will not be now heard to gainsay it. *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1.

A purchaser of all the partnership property of a firm, on their dissolution, does not thereby acquire the right to use the firm name as a label on his goods, or to advertise himself as the successor of such firm, and will be restrained from so doing. *Reeves v. Denicke*, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 92. In this case, Monell, J., said: "When, therefore, the name and style of a mercantile firm is that of the principal, and most responsible and influential member of the partnership, the mere transfer of the interests of such member, in the partnership property, will not convey the partnership's

4. **Rights of Partners Buying Others Out; Rights of Purchaser in Name of Retiring Partner.**—A partner who has sold out his interest in a firm to other partners, will be restrained from carrying on the same business under any name so nearly like that of his former firm as to be likely to deceive purchasers, and interfere with the business of his former partners, unless the name under which the firm did business happened to be the personal name of the retiring partner, in which case he could not, in the absence of an express agreement to the contrary, be restrained from using his own name, and he might even be able to restrain his former partners from using it, if by doing so they would make him responsible for their debts or deceive the public.¹

name to the purchaser, or give to him the right to continue its use against the consent of such person. . . . It is a very common mistake to suppose that a purchaser of the property of a mercantile firm is the 'successor' of the firm. He succeeds to the property, to all that is conveyed to him, but to nothing more; and he has no more right to describe himself as the successor of such firm, because he has purchased such property, than he has to designate himself the successor of a manufacturing company from which he has casually purchased some goods." *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394, *disapproved*, and *Howe v. Searing*, 6 Bosw. (N. Y.) 354, *followed*.

The remaining partner is not entitled, upon dissolution, and under a contract which permits him to take over the shares of the retiring partners at a valuation, to use the names of the retiring partners. *Dickson v. McMasters*, 18 Ir. Jur. 202.

Plaintiffs and defendants having carried on business as partners under the name of "A. J. White & Co.," defendants withdrew and set up the same business on their own account, using the same firm name. An injunction was refused so far as the use, by defendants, of the name of firm, "A. J. White & Co.," was concerned, the name of one of the defendants being A. J. White. *Comstock v. White*, 18 How. Pr. (N. Y. Supreme Ct.) 421.

1. In *Jennings v. Johnson*, 37 Fed. Rep. 364, it was held that the plaintiff, who had been a member of the firm which had prepared the article, and who had purchased the business, had a right to state on his labels that the article was prepared by the old firm.

An injunction lies to restrain part-

ners who have sold out their interest in the good-will of a business, from carrying on a rival establishment under a name so similar to that of the first as to mislead and draw off business. *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215; 52 Am. Rep. 811.

Two women, C. and W., carried on a partnership business under the firm name of "C. & W." C. married L., and afterwards proceedings were had to wind up the partnership, and by decree the partnership business, good-will, etc., was ordered to be sold to plaintiff or defendant, whichever should be the highest bidder. W. was the purchaser, and carried on the business under the old name. On appeal the court said, *reversing* the court below, that the assignment of the good-will and business included the exclusive right to the name of the old firm. *Levy v. Walker*, 10 Ch. Div. 436.

Plaintiff was a partner with defendant and his son, under the firm name of "Bryan Corcoran, Witt & Co." Defendant having purchased the business, good-will, trade names, trade-marks, etc., began business under the name of "Bryan Corcoran & Co.," or "Bryan Corcoran, Son & Co." The defendant was restrained from so doing, or from carrying on the business under any other name calculated to make people believe that he was successor to the old firm. *Witt v. Corcoran, Seton* (4th ed.) 257; 2 Ch. Div. 69; 45 L. J. Ch. 603; 34 L. T. N. S. 550; 24 W. R. 501.

Theodore and John McGowan were manufacturers of pumps, under the name of "McGowan Brothers." John sold out to Theodore his interest in the business, assets, etc., including the old patterns with name of "McGowan Brothers" on them. After contract of sale was executed, there was inserted

5. Rights of Partners on Dissolution Dependent Upon Nature of Trade-Mark; Rule as to Technical Trade-Marks; Rule as to Name of Partner or Partners.—On the dissolution of a partnership, technical trade-marks, being the assets of a firm and also indivisible, must either be sold with the business as entireties, or all partners may use them with equal right, subject to the exception, however, that on dissolution the partners revert to their individual rights and responsibilities, and each partner, in the absence of any agreement to the contrary, has an absolute right to control the use of his own name, and prevent its use by another, even although during the partnership it may have been the name under which the partnership did business.¹

in the notice of dissolution a privilege to Theodore of using the old firm name. Theodore, with others, incorporated under the name of "The McGowan Brothers Pump and Machine Company," and transferred to said corporation all his right and interest as purchased from John. Injunction was granted at suit of John to restrain the use of the words "McGowan Brothers" in said corporate name, the grant of its use to Theodore being in the nature of a revocable license. McGowan Bros. Pump, etc., Co. v. McGowan, 2 Cin. Super. Ct. (Ohio) 313.

Plaintiff and defendant carried on business under the firm name of "James Milbourn & Co." Plaintiff bought out defendant's share of the business and the latter set up the same business next door, and used the former firm name. An injunction was refused, "Milbourn" being the defendant's own name which he had a right to use. Bond v. Milbourn, 20 W. R. 197.

In Churton v. Douglas, Johns. 174; 28 L. J. Ch. 841; 5 Jur. N. S. 887; 33 L. T. 57; 7 W. R. 365; 22 L. R. 172, J. D. and his partners carried on business under the firm name of "J. D. & Co." J. D. sold out his interest in the copartnership and good-will of the business to his partners, and subsequently set up a similar business next door under the same firm name. An injunction was granted on the ground that, although he could not be prevented from carrying on the same trade, yet he could not adopt the name of the old firm. Wood, V. C., saying: "The name of a firm is a very important part of the good-will of the business carried on by the firm. . . . The question of trade-mark is, in fact, the same question. The firm stamps its name on the articles. It stamps the

name of the firm which is carrying on the business on each article, as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. And when you are parting with the good-will of a business, you mean to part with all that good disposition which customers entertain toward the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put in anything short of that."

1. A partnership to which is given by one of the partners the right to use his name as a part of the firm style or title, cannot, upon its dissolution, transfer that right to its successor. A grant by an individual of the right to the use of his name in that of a partnership of which he is not a member, given without consideration, is probably a mere license, revocable at pleasure. But the case of a trade-mark proper must be distinguished. Horton Mfg. Co. v. Horton Mfg. Co., 18 Fed. Rep. 618. The court saying: "If one has made of his own name a trade-mark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred." Acquiescence by any person in the wrongful use of his name will not prevent his asserting his rights in equity, if he has not had notice of such wrongful use during his acquiescence.

This case cites with approval Holmes v. Holmes, etc., Mfg. Co., 37 Conn. 278; 9 Am. Rep. 324, where it is said: "At the dissolution of the partnership, the partners revert back to their individual rights and responsibilities, and each

partner, in the absence of any agreement to the contrary, has an absolute right to control the use of his own name."

After the dissolution of a partnership, either of the partners can use a trade-mark belonging to the partnership, until, in some way, he has divested himself of that right. *Huwer v. Dannenhoffer*, 82 N. Y. 499.

In *Young v. Jones*, 3 Hughes (U. S.) 274, Hughes, J., said: "It is well-settled law that, upon the dissolution of a partnership, each partner has a right, in the absence of stipulation to the contrary, to use the name and style of the partnership in any way consistent with the facts of their business which does not have the effect of deceiving the public. He may say 'successor to the late firm,' and any like representations. In the absence of express stipulations, each partner may use the good-will of the former partnership. It is also held that rights in the trade-mark are analogous to rights in the good-will of a partnership. In the absence of express stipulation at the time of dissolution, each partner may go on and use the trade-mark of the firm. This right does not pass inferentially under a general assignment; but is like a man's skill in any kind of pursuit, it remains with him. See, for this principle, *Banks v. Gibson*, 11 Jur. N. S. 680."

In *Wright v. Simpson*, 15 Pat. Off. Gaz. 968, reversing *Simpson v. Wright*, 15 Pat. Off. Gaz. 248, the commissioner said: "Upon the dissolution of a co-partnership terminable at the pleasure of either partner, neither is entitled to the exclusive use or to the registration of its trade-mark, unless by virtue of special stipulations."

In *Robinson v. Findlay*, *Ward v. Robinson*, 9 Ch. Div. 487, an agreement was made between W., R. and G. by which W., a manufacturer, undertook to export through R., a commission agent, to G. in Rangoon, certain cotton goods. A trade-mark was arranged by the three parties for these exportations, some portions of which, and the general arrangement were new, while other parts consisted of R.'s coat of arms and name, and a symbol previously used by G. Some years after, W. ceased to send goods through R., but exported them through F. Both R. and W. laid claim to and continued to use the same mark. The court, speaking through James, Bag-gallay, and Bramwell, L. JJ., said the

principles of partnership applied. Bag-gallay, L. J., said: "It being clear upon the evidence that the designs were designs in which three persons were interested, for the purpose of carrying on a business or adventure in which all three were interested, it follows that upon the termination of that adventure, none of the three could claim any title against the other."

In *Condy v. Mitchell*, 37 L. T. N. S. 268, 766; 26 W. R. 269, M. and C., partners, who had sold a patented article, known as "C.'s Fluid," dissolved, and each commenced business for himself, C. in his own name and M. under the name of C.'s Fluid Company. An injunction by C. to restrain M. from using said firm name and mark was refused. Here James, L. J., said: "The partnership having come to an end, each partner having as much right as the other to the use of any name and of every word which had been used while the partnership existed, each of them set up a continuation of the same business; the tree of the partnership divided into two branches, one consisting of Condy and the other consisting of Mitchell. Condy set up his own part of the business, and Mitchell set up his part of the business; each of them had the right to use all the reputation that had been acquired by the manufacture and the sale of the article by the partnership; and each of them had the right to represent himself as the successor to, or the legitimate user of, the name of the article manufactured by the partnership. Each of them had a right at the moment of the dissolution of the partnership to use the word; and no special right could accrue to the plaintiff, unless he could show that, after the partnership had been dissolved, after both of the former partners had set up their several manufactures, the world was deceived into supposing that the one half which was represented by Mitchell was selling things made by the other half."

On the dissolution of a firm, the right to use the trade-marks thereof is an equitable asset of the firm, in which all the partners retain equal rights. *Weston v. Ketcham*, 39 N. Y. Super. Ct. 54.

Upon the dissolution of a partnership, the trade-mark vests in both partners, and a party claiming under a grant from one only has not an exclusive right to such mark, and, therefore, under the statute, cannot register it.

6. Rights of Creditors in Trade-Marks of Firm.—The creditors of a firm, if it be insolvent, may sell the good-will of the business and also the trade-marks, to satisfy their claims; but the interest of an individual member of a solvent firm in its trade-marks cannot be attached in any way, except so far as his interest in the firm is concerned.¹

Armistead v. Blackwell, 1 Pat. Off. Gaz. 603.

In *Scott v. Rowland*, 26 L. T. N. S. 391; 20 W. R. 508, on the dissolution of a partnership, the stock in trade was purchased by a surviving partner, but no assignment was made of the good-will. An injunction was granted on behalf of the outgoing partner to restrain the use of his name in the style of the firm. The vice chancellor said: "Even assuming that the good-will had been effectually assigned to the defendant, it would still be a question whether he would have a right to use the plaintiff's name. The law, as laid down in *Churton v. Douglas*, Johns. 174, makes an outgoing partner, who leaves his name in the style of the firm, liable to some extent for the debts of the firm; for instance, he would be *prima facie* liable on bills of exchange. In *Banks v. Gibson*, 34 Beav. 566, the outgoing partner was dead, and the case only goes to show that, as no liability can attach to an outgoing partner who is dead or bankrupt, there is no reason why his name should not be retained; but it is different where he is living. The injunction must be granted, restraining the defendant from using the plaintiff's name in connection with his business as a glass stainer, so as to represent that the plaintiff is a partner in the business."

In *Banks v. Gibson*, 34 Beav. 566, Romilly, M. R., said: "The state of the case seems to be this: The plaintiff's husband entered into partnership with the defendant for the term of fifteen years, and they carried on business until the death of the plaintiff's husband, in 1860. The articles of partnership contained a proviso, that, in the event of the death of either of the partners, before the expiration of the term of fifteen years, his executors or administrators should have the option, either of retiring from the partnership, or of continuing it with the surviving partner. What took place was this: The plaintiff's husband died in 1860, and the plaintiff, as his administratrix,

continued the partnership with the defendant for four years; they then dissolved the partnership and divided the assets between them as they thought fit. The name or style of the firm of 'Banks & Co.' in which the defendants had been engaged for a period of fourteen years, was an asset of the partnership, and if the whole concern and the good-will of a business had been sold, the name, as a trade-mark, would have been sold with it. If, by arrangement, one partner takes the whole concern, there must be a valuation of the whole, including the name or style of the firm. But if the partners merely divided the other partnership assets, then each is at liberty to use the name, just as they did before. It is the same as if two persons who alone carried on the business of Child & Co., thought fit to separate, each would be entitled to use the name by which they carried on their business."

An injunction will lie at the suit of one against his former copartner, restraining the continuance of the use of the signs containing the old firm name, without sufficient alterations or additions to give distinct notice of a change in the firm. *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394.

In *Hoffman v. Duncan*, Seton (4th ed.) 256; Cox's Man. of Trade-Mark Cases 122, an injunction was granted, after dissolution of the firm of "Hoffman & Duncan," to restrain one of the partners from the use of said name.

1. An assignment for the benefit of creditors and a subsequent transfer from the assignee to a purchaser of the trade-mark and good-will, and as connected with it, the business name of a partnership, does not confer upon the purchaser (who subsequently organizes a corporation under the old firm name), the right to represent that the old firm has resumed business, and generally conduct the business as if it were a continuation of the old firm and not a corporation. In view of the statutes of the state against doing business under a fictitious name, a purchaser, as

7. Rights of Surviving Partners in Firm Trade-Marks and Name of Deceased.—Trade-marks, like good-will, are an asset of the firm, and when a firm is dissolved by the death of a member, they do not survive to the survivor, but must be sold and accounted for in the distribution of assets. The name of the deceased, which may be the trade-mark of the firm, may be used by the survivor or successors, if proper consideration has been given therefor in the settlement of the firm's affairs, and a representative of the estate cannot restrain the surviving partners from so doing. This rule is based upon the ground that the former bearer of the name, being dead, can no longer be held responsible for the firm's debts nor injured by the use of his name.¹

above, has not the right to do business under the old firm name, but only as successor of that firm. The surviving partner of the old firm has, after the assignment, no right growing out of his former connection, to the business name, trade-mark, or anything incident to the old firm, except to the use of his own name, and this he must use in a way not calculated to deceive. *Hegeman v. Hegeman*, 8 Daly (N.Y.) 1.

In *Taylor v. Bemis*, 4 Biss. (U.S.) 406, the sale by execution creditors of a partner's interest in a firm name or trade-mark, was refused, on the ground that such interest was merely a right to a part of it, and that the right was too shadowy and intangible to be of any value apart from the partnership business.

1. In *Young v. Jones*, 3 Hughes (U.S.) 274, Hughes, J., said: "It has been a matter of some debate and contrariety of decision by the courts, whether one surviving partner, after the death of the other, succeeds to the good-will of the firm; the better opinion now being that he does not. *Hammond v. Douglas*, 5 Ves. 539. Even where the good-will of a prosperous business of eight years' duration has been sold by its proprietor along with the lease of the premises, and all the stock, wagons, and fixtures used in the business, which consisted of 'Howe's Bakery,' it was held in a leading case that the vendee had not the right to use the name 'Howe' of the vendor, that not having been expressly mentioned in the contract of sale. *Howe v. Searing*, 10 Abb. Pr. (N.Y. Super. Ct.) 264; *Collender on Partnership* (last ed.) 236; 2 Kent's Com. 372, in notes."

Defendant, a surviving partner of the firm of Phelan & Collender, purchased from the executors of his de-

ceased partner the interests of the latter in the partnership property, patents, trade-marks, etc., and described himself as "Successor to Phelan & Collender," and his tables as "Phelan & Collender's Standard American Tables." Suit was brought by a son of the deceased partner to restrain defendant from so doing. An injunction was refused on the ground that plaintiff had no more right of action than any other person of the same name, and that his bill did not allege that defendant had acted with intent to deceive, etc. *Phelan v. Collender*, 6 Hun (N.Y.) 244.

Partnership stock includes the good-will of the business and the right to use the trade-mark. On the death of one partner and a sale to the other under a prior agreement, these do not survive to the surviving partner, but must be included in the valuation of the partnership stock. *Hall v. Barrows*, 32 L. J. Ch. 548; 9 Jur. N. S. 483, 8 L. T. N. S. 227; 33 L. J. Ch. 204; 10 Jur. N. S. 55; 9 L. T. N. S. 561, *reversing* the court below, Lord Westbury saying: "The case requires only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property, and might be sold with the business and works; and that, as it might be so sold, it must be included in the valuation to the surviving partner."

Two of the defendants, who had been in business with J. G. Loring before his decease, under the firm name of "J. G. Loring & Co.," after his death took in the remaining two defendants as partners, and continued to use the name of the old firm both as a trade name and trade-mark. Suit was brought by the executors of J. G. Loring for an injunction to restrain defendants from so doing. It was decided

that defendants had acquired by user a right to use the name as a trade-mark; but that the representatives of J. G. Loring, under the *Massachusetts* statute (Gen. Stat., ch. 56), could restrain the use of the name as a trade name. *Bowman v. Floyd*, 3 Allen (Mass.) 76; 80 Am. Dec. 55. See also *Rogers v. Taintor*, 97 Mass. 291.

In *Howe v. Searing*, 6 Bosw. (N. Y.) 354; 10 Abb. Pr. (N. Y.) 264; 19 How. Pr. (N. Y.) 14, Hoffman, J., said: "It is, I apprehend, a well-settled rule, that the good-will of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock in trade, and must be disposed of in some manner for the benefit of the firm." But the sale of the good-will of the business does not of itself transfer a right to the vendor's trade name.

The good-will of a partnership is a part of the assets of the firm, and does not survive to surviving partner. *Macdonald v. Richardson*, 1 Giff. 81; 5 Jur. N. S. 9; 32 L. T. 237.

Good-will is a part of the partnership assets and does not survive. *Wedderburn v. Wedderburn*, 22 Beav. 84; 25 L. J. Ch. 710; 2 Jur. N. S. 674; 28 L. T. 4. The court said: "The good-will of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity."

Although the personal representatives of a deceased partner may have a right jointly with survivor to the use of a trade-mark of the firm ("a trade-mark being in the nature of a personal chattel"), still the surviving partner alone has sufficient interest to entitle him to file a bill for injunction against an infringer. *Hine v. Lart*, 10 Jur. 106; 7 L. T. 41.

The good-will of a trade does not survive, but is partnership property. *Dougherty v. Van Nostrand, Hoff.* (N. Y.) 68; *disapproving Hammond v. Douglas*, 5 Ves. 539.

The good-will of a medical partnership survives to the surviving partner. *Farr v. Peace*, 3 Madd. 74.

In *Robertson v. Quiddington*, 28 Beav. 529, the court said: "The case of *Lewis v. Langdon*, 7 Sim. 421, also appears to me to establish very clearly that the firm's name (whatever its value may be) survives to the surviving partner." And in *Lewis v. Langdon*, 7 Sim. 421, Vice Chancellor Shadwell

said: "I cannot but think, when two partners carry on a business in partnership together, under a given name, that, during the partnership, it is the joint right of them both to carry the business on under that name, and that upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor."

In *Hammond v. Douglas*, 5 Ves. 539, it was held that the good-will of a trade carried on in partnership without articles, survives and is not partnership stock; in *Crayshaw v. Collins*, 15 Ves. 218, Eldon, L. C., expressed doubt of the decision in *Hammond v. Douglas*, 5 Ves. 539, on the point that the good-will of a partnership survived.

But in *Webster v. Webster*, 3 Swanst. 490, an injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade, was refused. Thurlow, L. C., said: "It is impossible that using the testator's name in the trade, can subject his name to the trade debts."

As will be seen from the above cases there was some conflict in the early English cases as to whether, on the death of one member of a partnership, the trade-mark or good-will survived to the surviving partner. The rule is now definitely settled that both the trade-mark and the good-will are assets of the firm, and must be so dealt with. It has been, however, held that the trade name of a partnership will survive, but no reason is perceived why this should not be included in the valuation of the assets made to the representatives of the deceased partner.

It has also been well settled that, upon an assignment of the business or good-will, the trade-mark will pass. But a distinction must here be taken between trade-marks and trade names. The cases with regard to the latter are very conflicting, but the following seems deducible from the authorities: Where, by the use of the trade name, a liability may possibly attach to the retiring member of the firm, such use of the trade name will be enjoined; but where the assignee of the good-will, etc., whether continuing partner or third person, may use the firm name without any danger of liability attaching to the outgoing partner or deception of the public, such use will not be restrained. Again, where the trade name of the firm has also become by use its recognized trade-mark, it will pass as such by assignment of the business or good-

IX. LACHES AND ABANDONMENT—1. Laches.—In *England*, a trade-mark owner who permits the use of his mark by others while he continues to use it himself may, by gross laches, forfeit the right to enjoin the infringer. But in the *United States* this rule is rarely, if ever, applied,¹ the general rule being that delay in asserting a trade-mark right against an infringer amounts only to a

will, and its use will not be restrained. It may also be stated as a general doctrine, that where the name of the firm is substantially that of the assignor or outgoing partner, he will not be prevented from subsequently setting up business under his own name, in spite of its identity with, or close resemblance to that of the old firm, unless by sale or contract he is estopped to claim the right to use his own name.

1. In *Sanders v. Jacob*, 20 Mo. App. 96, Thompson, J., said: "The question of laches would be a serious one if there were no element of fraud in the case on the part of the defendant. . . . If the defendant had adopted this trade name innocently, and had gone on honestly practicing his trade under that name for four years, without objection on the part of the plaintiff, and had built up an extensive business under that name, we should say that it would be contrary to the maxims of equity to enjoin him from further practising under that name, at the suit of the plaintiff, at this late day. But where the element of fraud supervenes, lapse of time does not purge the defendant's conduct of this taint."

In *Estes v. Worthington*, 22 Fed. Rep. 822, a motion for a preliminary injunction was denied. Wallace, J., said: "Laches in prosecuting infringers has always been recognized as a sufficient reason for denying a preliminary injunction; sometimes, apparently by way of discipline to a complainant who has manifested reluctance to burden himself with the expense and vexation of a lawsuit, and delayed legal proceedings until his patience was exhausted. See *Bovill v. Crate*, L. R., 1 Eq. Cas. 388. When delay of the owner of a patent or trade-mark to prosecute infringers has been of a tendency to mislead the public, or the defendant sought to be enjoined into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing. So, also, where, as in this instance, the extensive use of the trade-mark by others

with the implied acquiescence of the owner has contributed to give a reputation and create a demand for the article to which it has been applied, which it would not otherwise have acquired, equity should not by any stringent interlocution assist the owner to secure these fruits."

In *Re Heaton's Trade-Mark*, 27 Ch. Div. 570, Kay, J., said: "Where persons come and object, in whatever form, to the use of a trade-mark which has been used for a great number of years, it does not follow as a matter of course that the use for a great number of years is an absolute bar to obtaining an injunction; but most certainly it throws on those who object to the use the onus of proving that it was originally a fraudulent use, and that it is calculated to deceive; and very much stronger evidence is required in such a case where there has been a long user than would be required in another case."

In *Sawyer v. Kellogg*, 9 Fed. Rep. 601, Nixon, D. J., said: "In *England* the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrongdoer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant." See *White v. Schlect*, 14 Phila. (Pa.) 88; 67 P. & S. Am. Trade-Mark Cases; *Fillay v. Child*, 16 Blatchf. (U. S.) 376.

Plaintiffs were manufacturers of "Estcourt's Hop Supplement," and defendants began to sell another article as "Estcourt & Co.'s Hop Essence." An injunction was refused on the ground of delay, plaintiffs having waited seven months after knowledge

license at will which can be terminated at any time by a suit for an injunction.¹ And if the title of the plaintiff and the infringement

of use of word "Estcourt" by defendants, and failing then to produce evidence that a single person had been misled. *Estcourt v. Estcourt Hop Essence Co.*, 31 L. T. N. S. 567; L. R., 10 Ch. 276; 44 L. J. Ch. 223; 32 L. T. N. S. 80; 23 W. R. 313.

In *Rodgers v. Rodgers*, 31 L. T. N. S. 285, the mark in question was the words "Norfolk Works" or "Norfolk," applied to designate the place of business of both parties. Turner, L. J., said: "I do not think that as a matter of law the mere fact that it [the mark] has been used for a great number of years, necessarily affords a defense. If it was clearly made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs having a remedy."

Where for twenty-five years complainants have had knowledge that their trade-mark is being infringed by rival manufacturers and have acquiesced in such use, they will be estopped from asserting their rights against innocent purchasers of such goods. But whether long acquiescence might debar complainants from remedy for their injury as against rival manufacturers, *quære*. *Rodgers v. Philp*, 1 Pat. Off. Gaz. 29.

Isaacson v. Thompson, 41 L. J. Ch. 101; 20 W. R. 196, was a suit to restrain the use of trade-names in a fraudulent manner. The vice chancellor said that a delay of nine or ten months since discovery of the user, in asking for relief, was good ground for refusing an interlocutory injunction; that it is one of the most wholesome rules that a person who comes for the extraordinary relief of an injunction should come speedily.

In *Beard v. Turner*, 13 L. T. N. S. 746, a delay of two years on the part of the plaintiff in asserting his rights was held to disentitle him from asking for an account of profits. The court said: "But suppose you wish to profit by that act of which you say you have a right to complain, and shall at some future period complain of, then I apprehend this court will say, You must come here at once; for this reason, that you ask in the bill for an account of the profits made by this gentleman upon the sale of these goods. . . .

By not complaining at the time when you might complain, you are lying by, the man continuing to use your property, with the hope . . . of obtaining those profits which you stood by allowing him to make under this designation, without apprising him of your intention to make any such use of it."

In *Chappell v. Sheard*, 2 K. & J. 117; 1 Jur. N. S. 996; 3 W. R. 646. Wood, V. C., said: "The only doubt I have felt in this case was as to the laches; I have no doubt as to the infringement. But the principle is this—that if the owner of a copyright suffers one depredation to go unchallenged, the court will not allow him to call another's infringement in question. The plaintiffs have to purge themselves from the imputation of laches; but the onus of proving the laches is on the defendants; they must show a clear knowledge in the plaintiffs of the former infringements, and of their having put up with them for a length of time, if they wish to fix the plaintiffs with the consequences of that laches, so as to prevent them from having protection against any other depredations." In this case the delay, since the plaintiffs knew of the infringement, was not more than two months, and an injunction was granted. See also *Farina v. Gebhardt*, Cox's Man. of Trade-Mark Cases 118; *Flavel v. Harrison*, 10 Hare 467; 22 L. J. Ch. 866; 17 Jur. 368; 1 W. R. 213; 19 Eng. L. Eq. 15.

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. Duer, J., said: "The consent of a manufacturer to the use or imitation of his trade-mark by another, may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether express or implied, when purely gratuitous, may certainly be withdrawn, and, when implied, it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license. The existence of the fact may be a very proper subject of inquiry in making an account of profits, if such an account shall hereafter be decreed; but even the admission of the facts would furnish no reason for refusing an injunction."

1. See also cases cited in the note immediately succeeding. In *Blackwell's Durham Tobacco Co. v. McElwee*, 100

N. Car. 150, Smith, C. J., said: "The delay in vindicating an invaded right, beyond its weight in disproving its existence, cannot have the effect of extinguishing it, or operate beyond barring the action under the Statute of Limitations or a presumption of an abandonment. The indulgence may be deemed such an assent to the use of the device, as would not entitle the owner to demand damages for its intermediate use. . . . As is held in *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1, a long delay in prosecuting the claim after knowledge of the wrong, would be competent evidence of acquiescence in it, but could be no bar to recovery, unless extended to the period presented in the Statute of Limitations."

The unauthorized use by other parties of plaintiff's trade-mark, is no justification of defendant's acts of infringement; but, on the contrary, such circumstance is, under the authorities, one of aggravation. *Funke v. Dreyfus*, 34 La. Ann. 80.

In *Consolidated Fruit Jar Co. v. Thomas, Cox's Man. of Trade-Mark Cases* 665, Nixon, J., said: "There has been large discussion of the question how far laches, in stopping the infringement of a trade-mark, will deprive a complainant of the benefits of a preliminary injunction. But that discussion has been put to rest, so far as this court is concerned, by the recent decision of the supreme court, in the case of *McLean v. Fleming*, 96 U. S. 245, where it was held that acquiescence of long standing was no bar to an injunction, although it precluded the party acquiescing from any right to an account for past profits." The court also quotes with approval *Fullwood v. Fullwood*, 9 Ch. Div. 176; 47 L. J. Ch. 459; 38 L. T. N. S. 380; 26 W. R. 435. Here an injunction was asked to restrain defendants from representing the business carried on by them as identical or connected with that of plaintiff. The court said the fact that the plaintiff had delayed for a year and a half to commence action, after having become aware of the conduct of defendant, was no defense, the period fixed by the Statute of Limitations not having elapsed. Fry, J., said: "In my opinion, that delay (and it is simply delay) is not sufficient to deprive the plaintiff of his rights. The right asserted by the plaintiff in this action is a legal right. He is, in effect, assert-

ing that the defendants are liable to an action for deceit. It is clear that such an action is subject to the Statute of Limitations, and it is also clear that the injunction is sought merely in aid of the plaintiff's legal right. In such a case the injunction is, in my opinion, a matter of course, if the legal right be proved to exist. In saying that, I do not shut my eyes to the possible existence in other cases of a purely equitable defense, such as acquiescence or acknowledgment, and the various other equitable defenses which may be imagined; but mere lapse of time, unaccompanied by anything else (and to that I confine my observations), has, in my judgment, just as much effect and no more, in barring a suit for an injunction as it has in barring an action for deceit."

Where the defendant has been infringing the labels of the plaintiff or his predecessors in business, for more than twenty years, with the knowledge of the former during most of that time, although an injunction will be granted, yet by reason of the long-continued acquiescence of the plaintiff and his unreasonable delay in seeking relief, he will not be entitled to an account nor a decree for the profits. *McLean v. Fleming*, 96 U. S. 245, Clifford, J., saying: "Unreasonable delay in bringing a suit is always a serious objection to relief in equity; but cases arise in litigations of the kind before the court where the complainant may be entitled to an injunction to restrain the future use of a trade-mark, even when it becomes the duty of the court to deny the prayer of the bill of complainant for an account of past gains and profits. . . . Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

Plaintiff was the manufacturer and vendor of "Wolfe's Aromatic Schiedam Schnapps," and defendant applied the same name to other spirits. The fact that defendant had used this name for ten years, failed as a defense. *Wolfe v. Barnett*, 24 La. Ann. 97.

The fact that plaintiff has been guilty of laches for several years in not seeking to enjoin defendant from using his trade-mark, will not finally disentitle him, especially where defendant has not been misled by the silence of

by the defendant are clear, the injunction will, as a general rule, be granted, notwithstanding the fact that the infringement may have continued for a long period; but the trade-mark owner will be held to have forfeited his right to damages and profits by the delay.¹

plaintiff into making serious outlays. *Lazenby v. White*, 41 L. J. Ch. 354.

The fact that third parties have at different times also pirated plaintiff's trade-mark, does not aid defendant, "unless it appears that the plaintiff assented to, or acquiesced in, such infringements upon his rights. . . . The depredations of others upon plaintiff's rights furnish no excuse to the defendants for similar acts on their part. It is rather an aggravation to the plaintiff that others have also injured him, and courts have not shown any disposition to encourage that line of defense." *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275.

A moderate delay on the part of the plaintiff in prosecuting an infringement of his trade-mark or trade name, or such a delay as will enable him to obtain evidence, is no bar to his success. *Cave v. Myers & Seton* (4th ed.) 238; *Cox's Man. of Trade-Mark Cases* 304.

In *Lee v. Haley*, 21 L. T. N. S. 546; 18 W. R. 181, 242; L. R., 5 Ch. App. 155; 39 L. J. Ch. 284; 22 L. T. N. S. 251, Giffard, L. J., said: "But when you come to look at the question of delay, each case must necessarily depend upon its particular circumstances and its own particular nature. Now, the first thing which is to be observed in cases of this description is this, that it would not be safe for any plaintiff to come into this court until he could establish actual cases of deception, because you would be forever trying hypothetical cases, and you would have a number of people brought forward to say, and probably truly, that the thing done was not calculated to deceive. That being so, I think the plaintiffs were quite justified in waiting until they could collect a sufficient number of cases to prove to the court that there had been a case of deception." Here the delay was only about three months and an injunction was granted.

In *McCardel v. Peck*, 28 How. Pr. (N. Y. Supreme Ct.) 120, Miller, J., said: "It has never been held that a mere consent or acquiescence in the use of a name or trade-mark conferred an absolute and irrevocable right which

could not be annulled. While it may temporarily transfer and impart a right, it by no means follows that such a right is so fixed and determined that the original owner is forever afterwards debarred from revoking a permission previously given. The extent and character of the privilege thus conferred must depend very much upon the agreement and the circumstances of the case."

Acquiescence in the infringement of a trade-mark is not established by proof of the publication of advertisements during a period of ten years, which, although they sometimes infringe, yet they do not do so uniformly or continuously. *Kinahan v. Bolton*, 15 Ir. Ch. N. S. 75.

In *Rogers v. Nowill*, 17 Jur. 109, 171; 1 W. R. 122, 205; 3 De G. M. & G. 614; 22 L. J. Ch. 404; 20 L. T. 319, an injunction having been granted, restraining defendant from the use of a trade-mark containing the words, "J. Rogers & Sons," he formed, in 1848, a partnership with his father (who was named John Rogers), and brother, and used the same firm name. In 1853, plaintiff moved for committal for breach of injunction. V. C. Stuart refused the motion, but without costs, on the ground (among others) of acquiescence by the plaintiffs for five years. This holding was reversed on appeal. *Turner, L. J.*, said: "On the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined against as would entitle him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create a new right in him. See also *Taylor v. Carpenter*, 3 Story (U. S.) 458."

1. See also the cases cited in the note immediately preceding. A delay of two years in bringing suit to pre-

vent infringement is sufficient to preclude plaintiffs from obtaining an account of gains and profits. *Lloyd v. Merrill Chemical Co.*, 25 Ohio L. J. 319.

Where complainants' trade-mark for soap has been in common use among dealers for twenty years, and they have had knowledge of this fact for four years before filing their bill, although an injunction may be granted, they are not entitled to an account of sales or damages. *Low v. Fels*, 35 Fed. Rep. 361.

Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Where consent by the owner, to the use of his trade-mark by another, is to be inferred from his knowledge and silence merely, "it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license." *Menendez v. Holt*, 128 U. S. 514; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Julian v. Hoosier Drill Co.*, 78 Ind. 408; *Taylor v. Carpenter*, 3 Story (U. S.) 458.

Where plaintiffs, after the knowledge of an infringement of a trade-mark, delayed for five years bringing suit for injunction and account of profits, although an injunction will be granted, they will not be entitled to an accounting. *Cahn v. Gottschalk*, 14 Daly (N. Y.) 542.

In *Manhattan Medicine Co. v. Wood*, 4 Cliff. (U. S.) 461, Clifford, J., said: "Equity will not decree for an account of past gains and profits where there has been laches in bringing the suit and long acquiescence in the use of the trade-mark by others, and especially not where the acquiescence covers a period of fourteen years."

Where the plaintiff has slept on his rights and has not been very vigilant in ascertaining who was interfering with his trade-mark, an injunction may be granted, but an account will not be allowed earlier than the filing of the bill. *Ford v. Foster*, L. R., 7 Ch. App. 611; 27 L. T. N. S. 219; 20 W. R. 311, 318; 41 L. J. Ch. 682.

Plaintiffs, manufacturers, but not printers, of cotton cloths, stamped on them the word "Amoskeag." Defendants, printers, but not manufacturers, of cloths, used the same word in the same way. A delay of nine years on the part of the plaintiffs in prosecuting

their rights, after they had become aware of the infringement, was held to disentitle them to relief by injunction. *Amoskeag Mfg. Co. v. Garner*, 6 Abh. Pr. N. S. (N. Y. Supreme Ct.) 265. This case was reversed on appeal. *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y. Supreme Ct.) 297, the court comments upon the vagueness of the evidence by which the period of the plaintiff's laches (nine years), is established, and finds that it has been sufficient to prevent compelling an account for profits, but grants injunction. It criticises *Beard v. Turner*, 13 L. T. N. S. 747, contending for the rule laid down in *Harrison v. Taylor*, 11 Jur. N. S. 408, and *quoting*, with approval, *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. The court also makes a distinction with regard to laches, between a trade-mark and trade name, to the effect that, although a manufacturer and owner of a trade-mark for certain cotton goods may, by extreme laches, indicate that he never intended to apply that mark to a certain other kind of cotton goods, yet "such a process of thought would be inapplicable to an effort like the present, for laches can never have the effect of a concession that a person will not extend the use or the application of his name, nor can it confer upon the wrongdoer the right to build up and establish a business in another name."

Plaintiff, a pen-maker, stamped his pens "Joseph Gillott, Extra Fine," and sold them in boxes particularly labeled, the bottom of the box having a "caution," showing that he knew that others had attempted to pirate his trade-mark. There was also evidence that other manufacturers and stationers had been using the numerals "303" and the words "extra fine" in the same way for some fifteen years. An injunction was granted. *Potter, J.*, at special term, said: "There was, however, no evidence of the plaintiff's actual knowledge of this practice. The legal effect of this evidence is: First, that it is no defense that the fraud has been multiplied. Second, that acquiescence cannot be inferred, and it is revocable if it could be." *Leonard, J.*, at general term, said: "But it does not appear that he [the plaintiff] had discovered any individual whom he could attack as an offender. Nor can I believe that a 'caution' to the public against the fraudulent use of his device can be deemed an acquiescence

2. Abandonment.—The acquisition of title to a trade-mark has been likened in this article to the taking possession of a thing in a state of nature, the adoption and use for the first time for the particular purpose to which the mark is applied, with an intention to adopt it as a trade-mark, and acts indicating this intention, being the only acts necessary to acquire title.¹ This being true, it follows that this title once acquired by adoption and use may be abandoned to its original condition by disuse.² What will amount to an abandonment, is a question which must always be decided by the facts of each particular case; but the

in the use by others of the particular arrangement of numbers upon steel pens and packing boxes, which the plaintiff had first adopted and used, and which had come to be a designation of a particular and popular pen with the public." *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; *affirmed* 48 N. Y. 374; 9 Am. Rep. 553.

A delay of a year, or thereabouts, will not disentitle the plaintiff to an injunction, although he will not be allowed an accounting of profits. *Harrison v. Taylor*, 11 Jur. N. S. 408; 12 L. T. N. S. 339.

In *Cartier v. May, Cox's Man. of Trade-Mark Cases* 200, a motion to commit for breach of injunction was refused on the ground of plaintiff's delay for fifteen months; but injunction was enlarged to cover new fraud, and costs given.

1. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572.

In *Brower v. Boulton*, 53 Fed. Rep. 389, plaintiff's predecessors in business, good-will, and trade-marks, used the words "La Venzolana" on five shipments of flour in 1873, three in 1885, one in 1886, several in 1887, 1888, 1889 and 1890. Plaintiff used the mark thereafter and registered it in 1891. Defendant used the same words much more continuously since 1884. *Wheeler, D. J.*, said: "The use of these words by the plaintiff's predecessor in 1873 does not seem to have been sufficient in extent and time to make them indicate with definiteness that flour on which they might be placed came from him; and whatever rights in that respect had begun to accrue to him by that use were lost by the abandonment of the use long before the defendants began using them in 1884."

2. See *Menendez v. Holt*, 128 U. S. 514; *Symonds v. Greene*, 28 Fed. Rep. 834.

In *O'Rourke v. Central City Soap*

Co., 26 Fed. Rep. 576, the court said: "If the trade-mark be abandoned, or the use of it intentionally discontinued by the original proprietor, it may be readopted and appropriated by another, provided it has not become a mere description of quality or kind of product."

But a person may not appropriate a trade-mark belonging to another, without his consent, and subsequently acquire a good title thereto by the abandonment thereof by the first proprietor. *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Mouson v. Boehm*, 26 Ch. Div. 398; *Gray v. Taper Sleeve Pulley Works*, 16 Fed. Rep. 436.

The right to use a trade-mark is forfeited by non-user for a period of eight years, and cannot be resumed in prejudice of one who had used it exclusively during the period of abandonment. *Blackwell v. Dibrell*, 3 Hughes (U. S.) 151. Here the court, by *Hughes, J.*, said: "That the right to use a trade-mark may be lost by abandonment or disuse, is too clear to need argument or the support of authority."

In *Lea v. Millar*, *Seton* (4th ed.) 242; *Cox* 513, the plaintiffs were manufacturers of "Worcestershire Sauce," and the defendants sold a sauce under the same name and labels. An injunction to restrain defendants from so doing was refused, on the ground of prior use, and also because the plaintiffs had publicly abandoned their old labels by recently adopting a new one, bearing their signature, as a distinctive mark. *Cox*, in commenting on the case, says: "It is not to be understood that the court decided that by merely adopting a new label plaintiffs abandoned the right to protect the features which were common to both old and new." *Cox's Man. of Trade-Mark Cases* 513, and foot-note.

Where one, in the employ of another, discovers or invents an article, and

general rule is that the mark will never be held to have been abandoned, unless a clear intention can be gathered from the acts of the former owner to give it up and to abandon his title to it,¹

gives it a distinctive name, and permits the employer with his acquiescence for many years to appropriate it with that name, and put it forth to the public as his own, the inventor will be held to have abandoned all his rights therein to his employer. *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233.

Where the plaintiff has acquiesced for a long number of years in the use by the defendant of plaintiff's alleged trade-mark, "Lackawanna Coal," to designate coal mined by defendants from the Lackawanna Valley, he will be held to have licensed defendant to use the same, and will be estopped from enjoining him from using it for such purpose. *Delaware, etc., Canal Co. v. Clark*, 7 Blatchf. (U. S.) 112.

In *Browne v. Freeman*, 12 W. R. 305; 4 N. R. 476, the plaintiff, who was the inventor of a medicine which he called "Chlorodyne," moved for an injunction to prevent the defendant from using the same word on a preparation of his own make; the plaintiff having previously dismissed a bill with costs which he had filed against defendant for the same purpose. The court said that such dismissal of the previous bill was an abandonment of the exclusive right to the trade-mark.

1. In *Mouson v. Boehm*, 28 Sol. J. 361, Chitty, J., said: "To constitute abandonment, an intention to abandon must be shown. Mere non-user of a trade-mark could no more be said to constitute abandonment than the mere non-user of the right to foul a stream belonging to a mill as an easement, could be said to constitute an abandonment of the easement. . . . Boehm, however, had neither broken up his moulds nor erased this trade-mark from his books and lists. On the contrary, he had continued to issue the mark in the trade-list of his firm."

It is also said that the mere fact of non-registration does not help to show any intention to abandon, as registration is simply a precedent to suing; and knowledge of user must be shown in order to establish acquiescence.

In *Julian v. Hoosier Drill Co.*, 78 Ind. 408, the court, by Morris, C., said: "The question of abandonment is one of intention, and the burden of establishing it lies upon the party who

affirms it. . . . In view of these facts it cannot be inferred, from less than a year's suspension of the business by Ingels, that he intended to abandon either the business or his right to said trade-mark. The suspension must be, presumptively at least, attributed to indisposition or inability, rather than an intention to abandon valuable rights. Browne says that the question of abandonment is one of intention, and that 'A person may temporarily lay aside his mark, and resume it, without having in the meantime lost his property in the right of user. Abandonment, being in the nature of a forfeiture, must be strictly proven.' It is incumbent upon those alleging the defense of abandonment to show that the right had been relinquished to the public by clear and unmistakable evidence. Browne on the Laws of Trade-Marks, section 681; *Dental Vulcanite Co. v. Wetherbee*, 3 Fish. Pat. Cas. 87. . . . We think the delay, under the circumstances, will not preclude her from this relief. She did not intend to abandon and therefore has not abandoned, her right as to the future, to the exclusive use of her property in the trade-mark. Inability may prevent the use of the mark, but it will not confer upon others the right to use it, or constitute an abandonment." See *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1, Daly, C. J., said: "A trade-mark, whether it consists of a symbol or a descriptive name, may be abandoned; and, if it is, it may then be appropriated by anyone, who, by doing so, adopts it as his own; or after it is abandoned it may be resumed by the original proprietor and readopted by him, if in the meantime it has not been taken possession of by another, or by the community in general, or become, as a name or device, by general user, a mere designation of the kind of article or product, when its quality as an exclusive trade-mark is gone; the criterion or test being, was there an intention to abandon, which will depend upon the special circumstances of the particular case."

The fact that the owners of a trade-mark ("Excelsior"), at the request of

or unless a common-law right be limited by registration under the statutes.¹

X. INFRINGEMENT—1. In General.—It has long since been established, that in the case of a technical trade-mark, the right of the plaintiff to relief is entirely independent of the intention of defendant, and even of his knowledge of the fact of his infringement. Generally speaking, all that is necessary is, for the plaintiff to show the existence of his trade-mark, his exclusive right therein, and its use by the defendant upon articles of the same class of merchandise, without his license.²

2. Imitation of Name.—The infringement of a trade-mark which consists of a name, generally presents a case easy of determination. Given the fact that the name is a valid trade-mark, anything will

a few purchasers, erased it and placed another name upon the article sold, can in no sense be regarded as a representation to the public of the abandonment of the trade-mark and the adoption of another. Nor is the fact that the owners of a trade-mark, at the request of dealers, placed the dealer's name upon the article near the trade-mark, any indication of abandonment, especially when it is customary in the trade to do so. *Sheppard v. Stuart*, 13 Phila. (Pa.) 117. The court saying: "In considering acts, from which acquiescence or abandonment are or may be inferred, it should not be forgotten that a trade-mark is property. In all cases of litigation it may fairly be said to be valuable property. The man who lends his horse frequently, or permits another to use it, is never said to have abandoned his horse to the public, or to acquiesce in any claim to use the horse at pleasure. Much less can these acts justify the stranger who breaks into the stable and steals the horse.

. . . . It needs no citation of authorities to show that a license is not an abandonment—not even evidence of abandonment. It is, perhaps, the highest evidence of the assertion of the right and acquiescence therein.

. . . . It has been strongly urged that the plaintiffs have lost their right of action by their delay in bringing suit, or in asserting their claim. It may be that even a wrongdoer may sometimes successfully defend upon this ground. It must, however, be such a delay as would lead a reasonable person to suppose that the owner had abandoned his device, or such as induced the defendants to act, or under such circumstances as required the owner to assert his right. Even in

such cases, the title in the trade-mark is not lost or deemed abandoned, but the owner is estopped from asserting it to prevent another from using the device. It is evident, therefore, that each case must be decided upon its own facts. There can be no fixed rule, and time is only a matter of evidence, to be considered with all others."

The abandonment of a trade-mark is not made out by showing numerous infringements in which the owners of such trade-mark have not acquiesced. *Williams v. Adams*, 8 Biss. (U. S.) 452. *Blodgett, J.*, said: "I do not understand the rule to be, that if a party infringes upon another's trade-mark, there is any fixed time in which he must bring suit in order to save his rights. Certainly there is no such neglect on the part of the complainants proved here, as would show an intention to abandon their trade-mark."

The fact that the plaintiff has discontinued the use of his trade-mark for three years and adopted another, will not deprive him of his right of action against one who uses the original mark on the article in question, thus falsely purporting it to be of the plaintiff's manufacture. *Lemoine v. Ganton*, 2 E. D. Smith (N. Y.) 343.

1. See *Richter v. Anchor Remedy Co.*, 52 Fed. Rep. 455; *aff'd* on app. 59 Fed. Rep. 560; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572.

2. "The first appropriator of a name, etc. . . . is injured when another adopts the same mark . . . for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former." *Strong, J.*, in *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311. See also *Osgood v. Rock-*

wood, 11 Blatchf. (U. S.) 314; Kinney v. Allen, 1 Hughes (U. S.) 106.

The language of U. S. Statutes at Large, ch. 138, p. 502, is that any person who shall reproduce . . . any trade-mark registered, etc., and affix the same to merchandise of substantially the same descriptive properties, shall be liable to an action.

In *Liggett Tobacco Co. v. Hynes*, 20 Fed. Rep. 883, Parker, J., said: "To constitute an infringement exact similarity is not required; there may be an infringement without it. . . . Nor need the resemblance be such as would deceive persons seeing the two trade-marks placed side by side. . . . But the tradesman brings his privilege of using a particular trade-mark under the protection of equity if he proves, or it is apparent or manifest to the court by inspection, that the representation employed bears such a resemblance to his as to be calculated to mislead the public generally, who are purchasers of the article, to make it pass with them for the one sold by him. If the indicia or signs used tend to that result, the party aggrieved will be entitled to an injunction. . . . The plaintiff is entitled to protection if the trade-mark of defendant would deceive the ordinary purchaser, purchasing as such persons ordinarily do."

The innocent consignee and purchaser of articles intended for his own use, but bearing a spurious trade-mark, is liable to injunction at the suit of the owner of the trade-mark, and even if the former assents to an undertaking comprising all the relief asked for in the bill, yet he is liable for costs, certainly where the consignment is a large one, in this case 5000 cigars for private use. *Upmann v. Forester*, 24 Ch. Div. 231.

In *Low v. Hart*, 90 N. Y. 457, *Rapallo, J.*, said: "Although the proof does not establish an infringement by the defendant to any great extent, yet we think that where it is shown that a dealer has the imitated article in his store, and offers it for sale as genuine, even though but a single sale is proved, that is sufficient to sustain an injunction against a continuance of the wrong, and that an action for such injunction will not be defeated solely on the ground that on the day it is brought, the dealer happens not to have any of the article on hand."

In *Seixo v. Provezende*, L. R., 1 Ch. 192; 12 Jur. N. S. 215; 14 L. T. N. S.

314; 14 W. R. 357. the plaintiff, a Portuguese wine-grower, sold his wine in casks, stamped with the figures of a crown and an eagle, and the letters "B. S." on the head of the cask, and the word "Seixo," and the year of the vintage at the bung-hole. The defendants, London merchants, sold their wine in casks stamped with the figure of a crown, the letters "C. B.," the words "Seixo de Cima," and the date 1861, both on the heads of the casks and at the bung-hole. An injunction was granted to restrain defendants from using the crown and the word "Seixo," or other marks, etc., likely to cause their wine to be mistaken for that of the plaintiff. *Cranworth, L. C.*: "What degree of resemblance is necessary, from the nature of things, is a matter incapable of definition, *à priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would have no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of a rival manufacturer, and would purchase it in that belief, the court considers the use of such mark to be fraudulent. But I go farther. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

In *McAndrew v. Bassett*, 33 L. J. Ch. 561; 10 Jur. N. S. 492; 10 L. T. N. S. 65, 442; 4 De G. J. & S. 380; 12 W. R. 777, *Westbury, L. C.*, said: "An element of the right to the property in a trade-mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade-mark, at the time when the defendants imitate it. The essential ingredients for constituting an infringement of that right probably

be held to be an infringement of it which has the same sound when used to describe the article, and which has sufficiently the same appearance to cause one name to be mistaken for the other. The trade-mark name of an article is generally the essential feature of the mark by which the goods are known and designated, and an infringement will be held to exist where this name is employed by a defendant, although the other indicia of package and labels may be different. A single sale by an infringer will be sufficient to entitle the trade-mark owner to an injunction.

The imitation of a name by which goods are known is frequently the most dangerous form of imitation, for the reason that purchasers may be misled who are entirely unfamiliar with the genuine goods, but who have only seen the name advertised, or have been told of the goods by their name by others and asked for them by name, without ever having seen them. The purchaser, under these circumstances, is much more liable to be misled and to accept the goods of an imitator for those of the owner of the trade name, than where familiarity with the goods is necessary.¹

would be found to be no other than these: First, that the mark has been applied by the plaintiffs properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. Cas. 529, an injunction was asked to restrain the use of a complicated stamp on leather cloth. The vice chancellor granted the injunction, but his decision was reversed by the chancellor. On appeal to the House of Lords the latter's judgment was affirmed. Westbury, L. C., said: "The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity; and, secondly, that this mark or symbol has been adopted or is used by the defendant so as to prejudice the plaintiff's custom and injure him in his trade or business." In the opinion in this case

Cranworth, L. J., said: "No general rule can be laid down as to what is or is not a mere colorable variation. All which can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 63, Clifford, J., in a dissenting opinion, said: "Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser, giving such attention to the same as such purchaser usually gives, and to cause him to purchase the one supposing it to be the other. *Gorham Co. v. White*, 14 Wall. (U. S.) 511; *McLean v. Fleming*, 96 U. S. 256. . . . For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs. *Wotherspoon v. Currie*, L. R., 5 App. Cas. 519."

1. The use of the phrase, "Improved Fig Syrup," upon bottles, wrappers, etc., resembling a similar preparation manufactured and sold by the name of

"Syrup of Figs," will be enjoined as an infringement of trade-mark. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. Rep. 175. In this case the court, by Beatty, J., said: "While there is a difference between the two, there is still such similarity as we think would lead many purchasers—the consumer, though not likely the general trade dealer—to purchase one for the other. It is against the probability of such impositions upon the consuming class of the public that courts will extend their protection."

The name, "P. T. Butler's," before the words, "Trade-mark—Best Soap," is not so similar to the words, "B. T. Babbitt's," before the same words, as to be an infringement of the latter, in the absence of proof that anyone has been deceived. *Babbitt v. Brown*, 68 Hun (N. Y.) 515. Van Brunt, P. J., saying: "When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material; but to sustain an action there must be an imitation of something that can legally be appropriated as a trade-mark."

In *Hutchinson v. Blumberg*, 51 Fed. Rep. 829, complainant used the word "Star" and the symbol of a star on his manufactured underwear, etc., which thereby became known as "Star Goods." Defendant used a star and a crescent in a similar way, the star, although somewhat different from that of complainant in color and otherwise, being so prominent that his goods also became known as "Star Goods." An injunction was granted. See also *Hutchinson v. Covert*, 51 Fed. Rep. 832, where the facts of infringement were the same, save in the use of "Lone Star" for "Star," and an injunction was granted.

Plaintiffs stamped on velvet ribbons as a trade-mark "G. F." Defendants, whose trade-mark was G & F, when they stamped it on velvet ribbons, did so with the ampersand greatly reduced in size as compared with the initials. A preliminary injunction was granted. *Giron v. Gartner*, 47 Fed. Rep. 467.

In *Foster v. Webster Piano Co.* (Supreme Ct.), 13 N. Y. Supp. 338, an action was brought by William Foster, as substituted trustee, etc., of the last will and testament of Albert Weber, deceased, whose trade-mark was "Weber, New York," against the defendants, asking for an injunction re-

straining them from putting on their pianos "Webster, New York." It was held, that the defendant's trade-mark was not likely to deceive, and the injunction was refused.

Plaintiff was the publisher of a newspaper called "The Electrical World." Defendant published a paper called "The Electrical Age," adopting a title-page generally similar to that of plaintiff, but being strikingly different in certain points, and printed in and upon different colors. Daniels, J., in refusing a preliminary injunction, said: "While there are points of general resemblance, there are also features of striking diversity, rendering the inference at least somewhat uncertain whether the defendant is publishing its newspaper under such a form of title-page as is calculated to produce the belief in the minds of subscribers or purchasers that the defendant's is the paper of the plaintiff. If that could, upon the affidavits and exhibits, be concluded to be the fact, then the case would be one for an injunction, for that would be a violation of the plaintiff's rights which no court could permit to be successfully devised and followed." *W. J. Johnson Co. v. Electric Age Pub. Co.* (Supreme Ct.), 14 N. Y. Supp. 803.

In *Stokes v. Allen*, 56 Hun (N. Y.) 526, plaintiffs published an illustrated book called "The Good Things of Life," consisting of pictorial illustrations of a publication known as "Life," etc. Defendant called his book "The Spice of Life," and it was made up of pictorials, etc., taken, not from the serial "Life," but from another paper. On the plaintiff's book the word "life" was in quotation marks, but this was not so on defendant's cover; the similarity of the two books was entirely in their size and color of binding. There was held to be no infringement. In the opinion, Daniels, J., said: "It is not sufficient to maintain the action that purchasers inattentively might accept the defendant's publication in place of the plaintiff's. But it is necessary to maintain their action that the defendants should have employed this word 'life' with the same significance, in whole or in part, as it has been employed by the plaintiffs."

It seems that the trade-mark, "Moxie," in the combination "Moxie Nerve Food," is infringed by a similar use of the word "Noxie." *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248.

Plaintiffs had long been the proprietors of a daily morning newspaper, called the "Morning Post." Defendants commenced the publication of a daily evening newspaper, called the "Evening Post." There was no evidence of actual injury. It was held (*reversing* the decision of Kay, J.), that although the public might be deceived into thinking there was a connection between the two papers, there was no probability that plaintiff would be injured thereby, and an injunction must be refused. Cotton, L. J., said: "There is only a suggestion of possible injury, and I think we ought not to act on that. In order to justify us in granting an injunction, we must have evidence to satisfy us that there is reasonable probability that, in fact, there will be damage to the party complaining." *Borthwick v. Evening Post*, 37 Ch. Div. 449.

Plaintiff was the publisher of a newspaper called "The Grocer and Oil Trade Review." Defendant published another newspaper, calling it "The Grocer and Wine Merchant and Irish Brewer and Distiller." An injunction was granted to restrain the use of the words "The Grocer," as the first or principal words in the title of defendant's publication, and the use of any title similar to or only colorably differing from that of plaintiff. *Reed v. O'Meara*, 21 L. R. Ir. 216.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, Bradley, J., said: "Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name 'Cellonite Manufacturing Company' is sufficiently similar to that of 'Celluloid Manufacturing Company' to amount to an infringement of the complainants' trade name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead."

Plaintiff owned a trade-mark in the

word "Sanitas," applied to certain disinfectants, etc. Defendant used similarly the phrase "Condi-Sanitas." An injunction was granted against the use of "Sanitas" alone, or in the above combination, or in any other way, which would infringe plaintiff's mark. *Sanitas Co. v. Condry*, 56 L. T. N. S. 621.

Plaintiff, a dentist, caused the words "New York Dental Rooms" to be registered as a trade name for his business. Defendant displayed signs with the words "Newark Dental Rooms," and used a printed form of contract with his customers very similar to that of plaintiff. It appeared from the evidence that the public confused the two establishments and mistakes occurred, and that defendant intended that they should occur. An injunction was granted. *Sanders v. Jacob*, 20 Mo. App. 96. *Followed in McCartney v. Garnhart*, 45 Mo. 593.

It seems that the word "Maizharina" used as a trade-mark for corn flour or starch, is in itself an infringement of the word "Maizena," similarly used; and this is certainly so when the former word is dressed in such accessories that it may be mistaken for the latter. *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 823. Here Wallace, J., said: "The rule is well settled that to enable the proprietor of a trade-mark to relief against an illegal appropriation, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; it is sufficient if there is such a degree of resemblance that ordinary purchasers, using ordinary caution, are likely to be deceived."

Plaintiff manufactured and sold a chocolate which he called "German Sweet Chocolate." Defendant sold a chocolate under the name of "Sweet German Chocolate," put up with wrappers and labels similar to those used by plaintiff. An injunction was granted. *Pierce v. Gintard*, 68 Cal. 68; 58 Am. Rep. 1.

The publication of a daily paper at 3 a. m. called "The Morning Mail," does not infringe upon the rights of the publishers of a tri-weekly paper, issued at 11 a. m. and called "The Mail." *Walter v. Emmott*, 54 L. J. Ch. 1059. Bowen, L. J., said: "The use of a similar name is not, as matter of law, conclusive to show that there is an intention to deceive, or, as matter of law, that there would be such a

deception as would cause an interference with or damage to the business of another, because we can conceive cases where the use of a similar name might be so hedged round by other circumstances as to destroy the natural effect of such an act. . . . Similar type, similar appearance in the papers, every kind of circumstance which tends to confuse, is evidence from which the inference may be drawn that the acts will confuse. But we must take them all into consideration, I agree that proof of actual mistake is not necessary."

In *Accident Ins. Co. v. Accident, Disease & General Ins. Corp.*, 54 L. J. Ch. 104, an injunction was granted to restrain defendants from the use of its trade name as above given, on the ground of likelihood of deception.

"The New Northwest," the title of a newspaper, is not infringed by the use of the words, "The Northwest News," as the name of another paper. Here intentional fraud was not alleged. *Duniway Publishing Co. v. Northwest Printing, etc., Co.*, 11 Oregon 322.

The name, "Sporting Chronicle," applied to a newspaper, does not infringe the name "Newcastle Chronicle," similarly used, the appearance and contents of the two papers being dissimilar, and there being no evidence of deception or intention to deceive. *Cowen v. Hulton*, 46 L. T. 897.

In *Guardian F. & L. Assurance Co. v. Guardian & General Ins. Co.*, 50 L. J. Ch. 253, the master of the rolls thought these names (as above) sufficiently similar to cause confusion, although there was no appearance of actual fraud in the assumption by the defendants of the objectionable name.

The words, "The Grocer," used as the name of a publication, is an infringement of "The American Grocer," similarly used. *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 25 Hun (N. Y.) 398.

"Thorley's Food for Cattle" was a condiment made (according to a particular recipe not invented by Thorley), first by Thorley, and afterwards by his executors at Thorley's works; but it had not become an article of commerce like "Liebig's Extract of Meat." Subsequently a company was started called "J. W. Thorley's Cattle Food Co.," who made a similar condiment and packed it in a similar way. It was held that, although a second Thorley might make and sell "Thor-

ley's Food," yet he must be careful to do so in a manner not calculated to deceive. An injunction was granted on the ground of intention to deceive. In this case, the descriptions and directions for use on the article were identical and helped to make out the case of deception. *Thorley's Cattle Food Co. v. Massam*, 14 Ch. Div. 748.

The phrase "Great IXL Auction Co.," used as a sign over a store, is not an infringement of the phrase "IXL General Merchandise Auction Store," similarly used. *Lichtenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592.

Plaintiffs used the coined word "Electro-Silicon" as a trade-mark for polishing powder. Defendant applied the term "Electric-Silicon" to a similar preparation and imitated the plaintiff's packages, etc. *Van Vorst, J.*, in granting an injunction, said: "The form of the boxes, the color of the paper, the arrangement of the printed matter, the name 'Electric-Silicon,' are all suggestive of a design to fraudulently imitate the plaintiff's trade and business and to reap gain thereby." *Electro-Silicon Co. v. Trask*, 59 How. Pr. (N. Y. Supreme Ct.) 189.

Plaintiffs published a book entitled "Payson, Duntun and Scribner's National System of Penmanship." Defendants issued one similar in form, binding and color, entitled "Independent National System of Penmanship." An injunction was granted to restrain the use of the words "National System of Penmanship." *Potter v. McPherson*, 21 Hun (N. Y.) 559.

The use on labels, etc., of the word "Apollonis," in connection with the representation of a bow and arrow or anchor, is an infringement of the word "Apollinaris," and the representation of an anchor similarly used. *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatchf. (U. S.) 380.

In *Merchant Banking Co. v. Merchants' Joint Stock Bank*, 47 L. J. Ch. 828, *Jessel, M. R.*, said: "In my opinion there is not sufficient similarity in the two names, as above, necessarily to lead to the inference that there was an intention to deceive." An injunction was refused.

In *Hurricane Patent Lantern Co. v. Miller*, 56 How. Pr. (N. Y. Supreme Ct.) 234, *Lawrence, J.*, said: "I do not regard the words 'tempest' and 'hurricane' as so similar [applied to lanterns] as to warrant the conclusion that the public is liable to be misled into

believing that the lamps are of the same manufacture."

In *Charleson v. Campbell*, Ct. of Sess. 4th Ser. IV., 149; 14 Scot. L. Rep. 104, the plaintiff's hotel bore the name, "The Station Hotel, Forres;" that of defendant, "The Royal Station Hotel, Forres." The word "Royal" was deemed sufficient to distinguish them and prevent infringement.

In *Talcott v. Moore*, 6 Hun (N. Y.) 106; Cox's Man. of Trade-Mark Cases 478, it was held that "The Red and White Book" was too dissimilar from "The Little Red Book, New Series, 1875" to grant an injunction, even when there was an apparent attempt to deceive. Daniels, J., said: "The points of difference are so prominent and striking as at once to produce the impression that both the medicines and the books are different productions. . . . The rule upon this subject is practically the same as that applied for the protection of trade-marks, when, in order to maintain an action for an injunction, it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived."

Plaintiff, the manufacturer and inventor of "Ford's Eureka Shirt," sold shirts marked with the words "R. Ford's Eureka Shirt, London." Defendant sold other shirts, marked with the words "The Eureka Shirt." An injunction was granted to restrain the use of the word "Eureka," but not to extend to advertisements between defendant and the trade. *Ford v. Foster*, L. R., 7 Ch. App. 611; 27 L. T. N. S. 219; 20 W. R. 311.

Plaintiff, who was entitled to the exclusive right to import from the Leopoldshall mines a rock salt, called Kainit, sold it as "The Genuine Leopoldshall Kainit." Defendant sold another salt, not from the same mines, as "Kainit [Leopoldsalt]." An injunction was granted. The court saying: "There is nothing in the evidence that I can see to lead to a serious belief that they have used this name *bona fide*. . . . The misspelling of the word is, to say the least, as suspicious a circumstance as can be conceived." *Radde v. Norman*, L. R., 14 Eq. 348; 41 L. J. Ch. 525.

Plaintiffs sold cutlery, marked "Rodgers," "Rodgers & Sons," etc., together with a maltese cross and a star. Defendants used the same symbols in the

same way, together with the words "Rogers & Sons." The court deemed this a fraudulent imitation, but the injunction was refused on other grounds. The court said: "To constitute infringement in trade-marks, it is by no means essential that the imitation should be exact or perfect. . . . If there be a resemblance designed and calculated to mislead the purchaser, it is sufficient." *Rodgers v. Philp*, 1 Pat. Off. Gaz. 29.

It seems that the words "The Hero," used as a stamp on glass jars, is infringed by the use of the words "The Heroine," similarly used. *Ludlow, J.*, said: "The court will not interfere when ordinary attention will enable the purchaser to discriminate. . . . It must appear that the ordinary mass of purchasers, paying that attention which such persons usually do, in buying the article in question, would probably be deceived." *Rowley v. Houghton*, 2 Brew. (Pa.) 303; 7 Phila. (Pa.) 39.

Semble, that there is no such similarity between the names "La Cronica" and "El Cronista," applied to newspapers, as to mislead the public and justify an injunction. *Stephens v. DeConta*, 7 Robt. (N. Y.) 343.

Plaintiff sold a preparation of cocoa called "Schweitzer's Cacaoatina." Defendant, Atkins, who had been in his employ, set up in business with a man, also named Schweitzer, and sold a similar preparation, labeled "Schweitzer, Atkins & Co's Cacaoatine." There was some similarity between the packets and labels used. It was held to be a colorable imitation and an injunction was granted. *Schweitzer v. Atkins*, 37 L. J. Ch. 847; 19 L. T. N. S. 6; 16 W. R. 108.

Plaintiff applied the term "Cocaine" to a hair oil of his own manufacture. Defendant used the word "Cocaine" on an article which he sold. An injunction was granted, "Cocaine" being a valid trade-mark, and the imitation of it deceptive. *Robertson, J., dissenting. Burnett v. Phalon*, 9 Bosw. (N. Y.) 193; 3 Keyes (N. Y.) 594; 3 Trans. App. 167; 5 Abb. Pr. N. S. (N. Y. Ct. of App.) 212.

In *Matsell v. Flanagan*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 459, a preliminary injunction was granted at the instance of the publishers of "The National Police Gazette," to restrain defendants from continuing the publication of the "United States Police

Gazette," printed so as to deceive the public.

The title of a newspaper, "Bell's Life in London," is infringed by the publication of another paper, entitled "The Penny Bell's Life and Sporting News." An injunction was granted to restrain the use of the words "Bell's Life," in the title of a newspaper, in any way. The court said: "This is an application in support of the right of property. . . . The absence of a fraudulent intention is no defense against an application to the court for an injunction by the person whose property has been injured." *Clement v. Maddick*, 1 Giff. 98; 5 Jur. N. S. 592; 33 L. T. 117.

In *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416, plaintiffs had long manufactured white lead, marking it with their name, and other words. Defendant also carried on the same business, marking his lead, "Brooklyn White Lead, pure, 100 lbs.," but subsequently changed his mark to "Brooklyn White Lead and Zinc Company." Mitchell, P. J., said: "He has no such company, and that part of his new title seems to have been adopted to imitate the plaintiffs', and to make his paint pass as theirs. Such would be its effect with any but the most cautious. . . . Any false name that is assumed in imitation of a prior true name is in violation of this right, and the use of it should be restrained by injunction." Defendant was enjoined from the use of the word "Company," or "Co."

The name "Irving House," or "Irving Hotel," applied to a hotel, is infringed by the use of the name "Irving Hotel" in the same way. An injunction was accordingly granted. *Howard v. Henriques*, 3 Sandf. (N. Y.) 725. See also *Stone v. Carlan*, 3 Month. L. Rep. 360.

Plaintiff invented and sold a certain medicine under his own name. Defendant made and sold a similar medicine, and on his labels used plaintiff's name, testimonials of plaintiff's medicine, similar directions for use, etc., in such an ingenious way as to make it appear at first as if they were applicable to defendant's preparation. It was held that the proceeding was wrongful and calculated to deceive, and an injunction was granted. *Franks v. Weaver*, 10 Beav. 297.

In *London, etc., Assur. Soc. v. London, etc., Joint-Stock L. Ins. Co.*, 17 L.

J. Ch. 37; 11 Jur. 938; 10 L. T. 127, an injunction to restrain defendants from using the first three words in the title of their company, "London and Provincial," was refused, on the ground that no deception or damage was likely to accrue to the plaintiffs.

In *Rogers v. Nowill*, 6 Hare 325; 5 C. B. 109; 17 L. J. C. P. 52; 11 Jur. 1039; 10 L. T. 88, an action was directed to be brought, the court saying: "The court will consider, whether, taking all the names together, it is or not apparent that there is such a deceptive quality as is likely to produce the injury complained of."

The names "The Democratic Republican New Era" and "The New Era," applied respectively as the names of different newspapers, do not conflict, there being no real probability of deception. *Bell v. Locke*, 8 Paige (N. Y.) 75; 34 Am. Dec. 371.

In *Knott v. Morgan*, 2 Keen 213, the London Conveyance Company ran omnibuses on which its name and other devices were painted in a particular way, and clothed its servants in a distinctive manner; the defendant began to run omnibuses painted similarly with the names "London Conveyance," "Original Conveyance for company," etc., and having servants similarly clothed. Langdale, M. R., said: "It is not to be said that the plaintiffs have any exclusive right to the words 'Conveyance Company' or 'London Conveyance Company,' or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, by attracting custom on the false representation that carriages, really the defendant's, belong to and are under the management of the plaintiffs."

In *Snowden v. Noah*, Hopk. Ch. (N. Y.) 347; 14 Am. Dec. 547, "The National Advocate" and "The New York National Advocate," the names respectively of two newspapers, were held to be sufficiently distinct to prevent deception. An injunction was accordingly refused.

In *Hogg v. Kirby*, 8 Ves. 215, plaintiff was proprietor of "The Wonderful Magazine." Defendant brought out a publication, very similar in appearance, under the same name, with

3. Imitation of Label.—The general rule applicable to the imitation of labels is, that any such imitation as may or can produce upon the mind of an incautious purchaser the impression and belief that the imitating label is that of a trade-mark owner with whose goods he is more or less familiar, will constitute an infringement. This is what is known as a colorable imitation. It will be noticed that this test involves a certain amount of knowledge on the part of the incautious purchaser of the label of the person whose goods he is seeking, and the imitation need only be such as would produce such an impression on the mind of an ordinary purchaser as would cause him to believe that the label of the infringer was the label of the trade-mark owner. This question is one which must depend upon the circumstances of each particular case, and no fixed rule can be laid down for its determination. Proof of actual deception of a purchaser should always be supplied, if possible, although it is not necessary to control the decision of the court.¹

the addition of the words "New Series, Improved." The Lord Chancellor, in granting an injunction, said: "I shall state the question to be, not whether this work is the same, but, in a question between these parties, whether the defendant has not represented it to be the same; and whether the injury to the plaintiff is not as great, and the loss accruing ought not to be regarded in equity upon the same principles between them as if it was, in fact, the same book."

1. Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, was a case of infringement of labels for liquors. Van Fleet, V. C., said: "They are of exactly the same size, their colors throughout are the same, the words descriptive of the goods are the same, and they are arranged in precisely the same manner, printed with letters of the same form and size, and in ink of the same colors." An injunction was granted.

Plaintiff's labels on packages of tobacco consisted of a representation of a shield or banner, an ellipse with a circle, and the words "Smoke and Chew," in red and yellow colors. Defendant used on his labels the same figures, colors, and words, but called his tobacco "Peach Blossom," while that of plaintiffs was named "Sweet Loftus." An injunction was granted. *Wellman, etc., Tobacco Co. v. Ware Tobacco Works*, 46 Fed. Rep. 289.

In *Myers v. Theiler*, 38 Fed. Rep. 607, Shipman, J. said: "The shape and color of the bottle, the shield and the general appearance of the label,

are well and designedly adapted to deceive the ordinary purchaser, in the ordinary course of purchasing the article in a small quantity for immediate use."

In *Brown Chemical Co. v. Stearns*, 37 Fed. Rep. 360, Brown, J., said: "A court of equity will enjoin unlawful competition in trade by means of labels of peculiar design or colors, or packages of distinctive shapes, intended to enable the defendant to pass his goods off as those of the plaintiff." *Citing* *Burton v. Stratton*, 12 Fed. Rep. 696.

Lever v. Goodwin, 36 Ch. Div. 1, was a case of infringement of labels and packets, used in the sale of soap. Cotton, L. J., said: "Looking at the two tablets, one cannot but see that there is a strong general resemblance between them, and especially to the eyes of people who cannot read. . . . There may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old common-law doctrine in respect of which equity will give to the aggrieved party an injunction in order to restrain the defendants from passing off their goods as those of the plaintiffs." *Lindley, L. J.*, said: "What is called the general 'get-up,' which is an expression used by some of the witnesses, is so similar that obviously the one might easily be mistaken for the other. Of course in all these cases there are differences as well as resemblances, and the question, so far as the packages are

concerned, must always be decided by contrasting the striking resemblances with the striking differences. Now, the only difference which strikes me at all is this: that Goodwin has substituted the word 'Goodwin' in large letters for 'Sunlight.' That is the whole difference which catches the eye. Then look at the resemblances; look at the paper; look at the printing; look at the blank space and the catch words; look at the whole thing, and it is impossible not to arrive at the conclusion, not only that one was intended to pass for the other, but that that intention has been realized."

In *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450, the court, by Moran, J., said: "To infringe a trade-mark, it is not necessary that it should be counterfeited or exactly simulated. It is enough that such a resemblance is produced as is calculated to mislead purchasers who use such ordinary care and observation as are commonly used by the public. *McLean v. Fleming*, 96 U. S. 245. . . . When the labels are examined together there are many differences, but the general appearance of the label, the color of the paper, the resemblance of the prominent features which go to make up the whole, taken in connection with the fact that the label is placed on packages in size, shape and appearance like those of appellee, are well suited to divert the attention of the purchaser from a critical examination that might correct the impression gained by casual inspection. The fact that careful buyers who scrutinize closely are not deceived, only shows that the injury is less in degree, not that there is no injury."

In *Hostetter v. Adams*, 10 Fed. Rep. 838, an injunction was granted to restrain an infringement of plaintiff's label and method of preparation for the market of "Hostetter's Celebrated Stomach Bitters." Blatchford, J., said: "It is plain that it is a copy from the plaintiffs' by design. Variations are made of such a character as to be capable of discernment and description. But the general effect to the eye of an ordinary person, acquainted with the plaintiffs' bottle and label, and never having seen the defendant's label and not expecting to see it, must be, on seeing the defendants', to be misled into thinking it what he has known as the plaintiffs'. The size, color, and shape of the bottle . . . the general effect of the horse and his rider . . . gives

an affirmative resemblance calculated to deceive an ordinary observer and purchaser, having no cause to use more than ordinary caution, and make him believe he has before him the same thing which he has before seen on the plaintiffs' bottle, and expects to find on the bottle he is looking at. The differences which he would see, on having his attention called to them, are not of such a character as to overcome the resemblances to the eye of a person expecting to see only the plaintiffs' bottle and label, and having no knowledge of another."

In *Fleischman v. Schuckmann*, 62 How. Pr. (N. Y. Supreme Ct.) 92, an injunction was granted to restrain the use by defendant of labels on loaves of bread, similar to those of plaintiff, etc. Van Vorst, J., said: "The intention of the defendant to imitate the plaintiff's label and the success of his effort is apparent. . . . In purchasing articles of so common use as bread, labels are not expected to be critically examined, and persons who cannot read, as well as those who do, are obliged to buy."

Plaintiff sold a certain article, put up for him in Paris, under a label containing the words "Conserves Alimentaires," the arms of the city of Paris, with a monogram "A. C.," the words "Paris" and "Julienne," and directions for use, etc. Defendant sold a similar article, with devices alike in size, type, color and appearance, except that the monogram was changed to "F. G." The court found that "customers and patrons were liable to be deceived," and granted an injunction. *Godillot v. Hazard*, 49 How. Pr. (N. Y. Super. Ct.) 5; 81 N. Y. 263.

Although a label bears a name which cannot in equity be protected as a trade-mark, this will not prevent a recovery, where the label is imitated in size, shape, color, device and general appearance. *Conrad v. Uhrig Brewing Co.*, 8 Mo. App. 277.

Dixon Crucible Co. v. Benham, 4 Fed. Rep. 527, was a case of infringement of wrappers and labels for stove polish, those of complainants and defendants being "substantially identical." An injunction was granted, the court observing: "The wrappers and label, and the arrangement of the printed characters, and the language of the wrappers and labels, have become a well-known trade-mark."

Plaintiff sold gin under the name of

"Udolpho Wolfe's Aromatic Schiedam Schnapps" in peculiarly shaped bottles, inclosed in peculiar wrappers. Defendant sold gin, called "Hart's Imperial Schiedam Schnapps," in somewhat similar bottles, inclosed in somewhat similar wrappers. An injunction was granted as regards the bottles and wrappers, but not as to the words "Aromatic Schiedam Schnapps," they being merely descriptive. Stawell, C. J., said: "Nor do I concur in the argument that we are to consider the intelligence or want of intelligence of the purchaser. We ought not to pronounce a decision which would be applicable to the one and inapplicable to the other, or ignore an uneducated and illiterate person who may desire to ascertain whether the article he is about to purchase is the same he has had before. We are to consider whether the infringement of the plaintiff's rights has been proved, not by taking particular isolated points, but by looking at the general resemblance of the packages, labels, bottles and other points." *Wolfe v. Hart*, 4 Vich. L. R. Eq. 125, 134.

In *Brown v. Mercer*, 37 N. Y. Super. Ct. 265, the court, by Van Vorst, J., said: "The defendant, by the adoption of a label similar in color, size, border, ornamentation, circular symbol, and red-colored ink, has so closely imitated the plaintiff's wrapper, that the careless or unobservant purchaser may be readily misled. A crafty vendor might readily palm off on an inattentive buyer the defendant's for the plaintiff's article. . . . It is no answer, that in certain particulars, defendant's label differs from the plaintiff's, as long as the imitation in other respects is so apparent, that purchasers have been and are likely to be deceived."

In *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204, plaintiff was the executor of Udolpho Wolfe, who manufactured "Wolfe's Aromatic Schiedam Schnapps." Defendants sold other spirits under the name of "Von Wolf's" or "Von Wolf's Aromatic Schiedam Schnapps." The labels used were also similar. An injunction was granted to restrain an infringement of the label and also any variation or imitation of the name "Wolfe." Rhodes, J., said: "A label is not a trade-mark, as recognized at common law, though it may, in fact, contain no words, figures, etc., except those which constitute the trade-mark. . . . But labels, like trade-marks,

may be adopted and used by a manufacturer or seller of goods, to distinguish his goods from those of others; and when another person uses the same label, or a colorable imitation thereof, it produces the same result as would a copy or colorable imitation of a trade-mark—that is to say, it is a false representation that the goods to which it is attached were manufactured or sold by the person whose label was copied or imitated, and purchasers are deceived and are liable to be defrauded. On principle, a person is as fully entitled to be protected in the use of his label as his trade-mark, and the authorities fully sustain this position."

The case of *Lea v. Wolf*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 389; 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 1; 46 How. Pr. (N. Y. Supreme Ct.) 157, was a question of similarity of labels placed on bottles of sauce. Ingraham, P. J., said: "The color of the paper, the words used, and the general appearance of the labels when used, show an evident design to give a representation of those used by the plaintiff, and the directions for using are an exact copy of those used by the plaintiff. . . . It is true that the defendants have substituted their name as the manufacturers, but that alone will not relieve the defendants from the charge of an attempted imitation of the labels and wrappers of the plaintiff for the purpose of misleading purchasers."

Plaintiff, a manufacturer of woollen cloths, invented certain new patterns, calling them, "Turin," "Sefton," etc. Defendants used the same names on tickets resembling the tickets of the plaintiffs. An injunction was granted to restrain defendants from using the above names as aforesaid, and any ticket being an imitation of, or similar to, or only colorably differing from, the ticket of plaintiff. *Hirst v. Denham*, L. R., 14 Eq. Cas. 542; 41 L. J. Ch. 752; 27 L. T. N. S. 56.

In *Bass v. Dawber*, 19 L. T. N. S. 626, plaintiff's trade-mark for ale consisted in the main of a red pyramid, the words "Bass & Co.'s Pale Ale" and a fac-simile of the signature, "Bass & Co." Defendants used labels generally resembling those of the plaintiff in some degree, but having the words "East India Pale Ale," a fac-simile of the signature "Dawber & Co.," and a red Spanish shield reversed. An injunction was refused. Lord Romilly said: "If a man should imitate an-

other person's label or trade-mark, and sail so near the wind as just to avoid an injunction, and do so intentionally, though the court does not grant the injunction, it would not willingly give him any costs of the proceedings. At the same time it must be borne in mind that if a person has *bona fide* taken a label or trade-mark which does resemble the label of another person, and this is not done with the intention to deceive, the court will not require him to change it completely, because a change in a trade-mark is a serious thing. . . . No tradesman likes to alter his trade-mark completely; it is like beginning a new firm; and therefore in dealing with cases of this description, if the defendant has acted *bona fide*, the court will not compel him by injunction to make a totally different thing."

In *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521, the labels used by contestants respectively were alike in size, form and color, the one bearing the name "Bovaline," and the other "Bovina." In the opinion of the court "the design evidently was to depart from the other sufficiently to constitute a difference when the two were compared, and yet to do it so skillfully that the difference would not be detected by an ordinary purchaser, unless his attention were particularly called to it and he had a very perfect recollection of the other label." An injunction was accordingly granted.

Where the plaintiff's trade-mark for washing powder consisted of an elaborate picture of a washroom, with tubs, baskets, etc., the words "Standard Soap Company, Erasive Washing Powder," with directions for use; and the trade-mark of the defendants consisted of a picture and label, the same as the plaintiff's, only in the use of the words "Washing Powder," the directions for use, and in the use of paper of the same color, the court thought this did not constitute an infringement. Two justices dissenting. *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76.

The labels on bottles of cologne manufactured respectively by plaintiff and defendant were similar in every respect, except that one contained the word "Josephs" and the other the word "Julichs." An injunction was granted. *Farina v. Cathery*, L. J. N. Cas. 134.

Plaintiffs sold ink in bottles on which were placed a peculiar style of label,

containing, among other things, the words "Stephens Blue Black," in white capital letters of a large type. Defendant sold ink in similar bottles with similar labels, only substituting the word "Steelpens" for "Stephens." The vice chancellor thought this a fraudulent and colorable imitation and granted an injunction. *Stephens v. Peel*, 16 L. T. N. S. 145.

Where there is no technical trade-mark, and the names of the claimants are the same, "the point of departure from strict legal right commences when the defendants employ a label bearing a general resemblance of form, color, words, and symbols, calculated to create the impression that their gin was that sold by the plaintiff, and in that way to deceive the public." *Binninger v. Wattles*, 28 How. Pr. (N. Y. C. Pl.) 206.

In *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144, Duer, J., said: "Without rejecting the evidence of my senses, I cannot doubt that the label or trade-mark which the defendants admit that they propose to use, from its general resemblance to that of the plaintiff and his firm, is well calculated to mislead the public, by inducing the belief that the articles to which it is affixed are in reality prepared or manufactured by the plaintiff's firm. Nor can I doubt that the label was framed with this design, since the imitation is so close, minute, and exact, as in my opinion to exclude the supposition of any other motive. It is true that the name of R. H. Rice, as proprietor, is printed on the label, but it is so printed as not to attract, but almost certainly to elude observation. A variation must be regarded as immaterial which it requires a close inspection to detect, and which can scarcely be said to diminish the effect of the fac-simile which the simulated label in all other respects is found to exhibit. Hence, were this the only question in the case, I should have no difficulty in holding that the injunction, which is sought to be dissolved, must to some extent, be retained and enforced." See also *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156.

Walton v. Crowley, 3 Blatchf. (U. S.) 440, was a case of infringement of labels, devices and trade marks, for needles, the size, shape, vignette, coloring and marking being so near identical as to make them pass easily for the same. *Betts, J.*, said: "A tradesman, to bring his privilege of using a

4. **Imitation of Package.**—Irrespective of a technical trade-mark, a manufacturer or trader has a right in the manner, style, and form in which he dresses his goods, to an extent sufficient to enable him to prevent other manufacturers of the same class of goods from adopting this same style of dress, package, and manner of preparing the goods for the market, which will be likely to deceive an intending purchaser, and induce him to believe that he is buying the goods of the first manufacturer when receiving those of the infringer. A rival trader has no right to beguile the public into buying his wares under the impression that they are buying those of a rival of established reputation, and this doctrine is extended to the protection of the form, shape, color, names, directions for use, location of labels, arrangement of wrappers, and all

particular mark under the protection of equity, is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such resemblance to his as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass with them for the one sold by him. If the indicia or signs used tend to that result, the party aggrieved will be allowed an injunction staying the aggression until the merits of the case can be ascertained and determined."

Although two labels or wrappers, when compared, may disclose palpable differences, yet if a person, seeing one in the absence of the other, would be likely to mistake it for the other, and purchase it under the supposition that it was the other, an injunction will be granted. *Whitney v. Hickling*, 5 Grant's Ch. (Up. Can.) 605.

Plaintiffs sold their cotton prints, labeled with the words, "Merrimack Prints, Fast Colors, Lowell, Mass." Defendants used in the same way on their own goods the words "English Free Trade, Merrimack Style, Warranted Fast Colors." The labels were of about the same size and color. An injunction, which had been granted, was dissolved on the ground that the infringement was not sufficiently clear without a trial at law. *Daly, J.*, said: "The court will hold any imitation colorable which requires a careful inspection to distinguish its marks and appearance from those of the manufactures imitated. It is certainly not bound to interfere where ordinary attention will enable a purchaser to discriminate." *Merrimack Mfg. Co. v. Garner*, 2 Abb. Pr. (N. Y. C. Pl.) 318;

4 E. D. Smith (N. Y.) 387. *quoting* *Partridge v. Menck*, 2 Sandf. (N. Y.) 622.

Shrimpton v. Laight, 18 Beav. 164, was a case of colorable imitation of labels for needles. The court said: "The way in which the court deals with these cases is not to see whether manufacturers themselves would distinguish them, but whether the public, who may be more easily misled, would probably be deceived. I have no doubt that if an ordinary person intended to buy the plaintiff's needles and the defendant's needles were handed to him over the counter, he would not know the difference." An injunction was granted.

Edelsten v. Vick, 11 Hare 78; 1 Eq. Rep. 413; 18 Jur. 7, was a case of similarity of labels used on packages of pins. The court said: "The embellishments of the label are of the same character, and they are arranged in the same form and printed in the same gothic type as the labels of the plaintiffs. The same colors are moreover used and there is a similar scroll or border. To the general eye, therefore, they resemble the plaintiffs' labels, although upon a minute examination differences may be detected." An injunction was granted.

In *Davis v. Kendall*, 2 R. I. 566, *Greene, C. J.*, said: "The adoption of the same label as the plaintiff's will, of course, be actionable; and so the adoption of a label so like the plaintiff's as to mislead the public, would be actionable. If the difference be merely colorable, it will not avail the defendant. But if the defendant state in his label that the article which he sells was made by himself, although he calls it by the same name as the plaintiff, he will not be liable."

other indicia which have the capacity of serving to identify the goods of a manufacturer as his own, and which can impress the mind of a would-be purchaser, who is to some extent familiar with the goods of the first adopter of these signs, into believing that in buying the goods of the second party he is receiving those of the first adopter.¹

1. In *Dreydoppel v. Young*, 14 Phila. (Pa.) 226, Thayer, P. J., said: "There is such a general resemblance of forms, words, arrangements, symbols and accompaniments, that the one wrapper might easily be mistaken for the other. In its general appearance the one is a servile imitation of the other, the differences being merely colorable, and evidently designed to evade the consequences of the unlawful infringement of the plaintiff's rights, and to preserve a sufficient individuality to enable the defendants to reap the benefit of their fraud. . . . Even if the resemblance between the plaintiff's wrappers and those used by the defendants was accidental, the plaintiff, according to all the decisions, would be entitled to protection against its injurious results to his trade."

Plaintiffs, manufacturers of soap, sold it, under the name of "Genuine Yankee Soap," using a peculiar wrapper, form of cake, hand-bill, etc. Defendant put up his soap similarly, using similar words of caution, notice, etc. An injunction was granted to prevent simulation, without deciding whether the words "Genuine Yankee" constituted a trade-mark. Woodruff, J., said: "They [the plaintiffs] have adopted in reference to their manufacture (of an article which any and every one may manufacture and sell if he please), a form and size of cake, a particular mode of covering and packing, a combination of three labels on each cake, an exterior hand-bill upon the box, and have so arranged the whole as to suggest to any one desiring to purchase their soap, upon an inspection, that the article is theirs and made by them. . . . All this the defendant has copied, with an exactness which is calculated to deceive even the wary, much more to entrap those who are not in the exercise of a rigid scrutiny. . . . We have no hesitation in saying that his acts are a clear infringement of the plaintiff's right. He has copied the form, appearance, color, style, and substantial characteristics in all respects, which distinguish the plaintiff's goods."

Williams v. Johnson, 2 Bosw. (N. Y.) 1.

Defendant pirated the name of the medicine ("Miller's Universal Magnetic Bath"), the language in which it was described, the directions for use, and the engraved design of the wrappers. An injunction was granted. *Ransom v. Ball* (Supreme Ct.), 7 N. Y. Supp. 238.

In *Jennings v. Johnson*, 37 Fed. Rep. 364, the medicine sold by plaintiff and defendant was "Dr. Johnson's Anodyne Liniment." Defendant in the sale of his preparation imitated the bottles, wrappers, and labels of plaintiff containing directions for use, etc. It was held that the public would be likely to be deceived, and an injunction was granted.

In *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625, Pardee, J., said: "Complainants ought in equity and good conscience to be protected from the imitation of their packages, so far as they are peculiarly designed and shaped for the purpose of distinguishing complainants' goods, and from the imitation in color, design, style, and lettering combined of the labels used to make said packages, when put on the market." See also *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Von Mumm v. Frash*, 56 Fed. Rep. 830.

In *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293, Brown, J., said: "I do not think the use of the words 'Coral Baking Powder' is in itself an infringement of plaintiff's trade-mark, 'The Royal Baking Powder.' The difficulty is with the similarity of the labels upon which the words are used. The general arrangement of the words being the same, the devices upon the cans being very much alike, and the labels of the same color and general appearance, I think purchasers might be very easily deceived into buying the one for the other." An injunction was granted to extend, not to the use of the words, but to their use in connection with cans and labels of the same general appearance as those of complainants.

A. made and sold "Morse's Syrup of Yellow Dock Root." B. sold a medicinal preparation in bottles perfectly similar to A.'s, and having the words "Dr. Morse's Celebrated Syrup" blown in the glass. The labels used were different, and A.'s bottles were wrapped in a paper cover, while B.'s were not. An injunction was granted and an account of profits derived from the use of bottles similar to those used by A. *Alexander v. Morse*, 14 R. I. 153; See also *Avery v. Meikle*, 81 Ky. 73; 117 P. & S., Am. Trade-Mark Cases.

Complainant's label consisted of a blue wrapper, pasted around a bottle holding bluing, and containing various inscriptions in gold and silver letters, and the general designation, "Sawyer's Crystal Blue and Safety Box." Defendant's label was of same size, color, and type, the inscriptions, although not identical, being very similar, and the general designation being "Sawin's Soluble Blue and Pepper Box." An injunction was granted. *Sawyer v. Kellogg*, 7 Fed. Rep. 720.

In *Sawyer v. Horn*, 1 Fed. Rep. 24, Morris, J. said: "We find that the respondent has been guilty of improper and inequitable conduct, to the injury of the complainant, in having designedly so put up, labeled, and packed his goods that purchasers, for whose use they are intended, are misled and deceived, and do get Horn's blue, when they desire and suppose they are getting Sawyer's." This was a case of fraudulent imitation of package and label. The general designation, encomium and directions were exceedingly similar in wording and general appearance.

Plaintiffs and defendants both sold bitters in similar peculiarly shaped bottles, the sealing-wax used was alike in color, and the wrappers, in appearance and printing, were very similar. The court thought there was great similarity in the "get-up" of the two articles, and granted an injunction. *Siebert v. Findlater*, 7 Ch. Div. 801.

Plaintiffs packed a compound, called "Hamburg Tea," in long packages with pink wrappers, with crimson papers of directions, yellow ones of warning, etc. Defendant used the same style and form of package, substituting his own name. Wheeler, J., said: "Probably no mere form of package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any par-

ticular make. But when the form of these packages, the color of the wrappers, and papers done up with them, and the form and color of the labels are considered all together, it is quite apparent that when they had been so long used by the orator's firm for holding this particular compound when offered for sale, the mere appearance of the packages would amount to a representation that they contained that article, of that manufacture." *Frese v. Bachof*, 14 Blatchf. (U. S.) 432. See also *Frese v. Bachof*, 12 Blatchf. (U. S.) 234.

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required, to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights, and to prevent their continued invasion."

Hostetter v. Vowinkle, 1 Dill. (U. S.) 329, was a question of infringement of labels and packages. Dillon, C. J., said: "But the size of the labels and the devices, the appearance, the directions for the use, the size and shape of the bottles, mode of packing, etc., were in exact imitation of the plaintiff's, and the boxes or cases intended for sale were marked 'Dr. Hostetter's Bitters,' the same name as the genuine." An injunction was granted.

In *Moorman v. Hoge*, 2 Sawy. (U. S.) 78, Sawyer, C. J., said: "Doubtless a bottle, vessel or package of a peculiar form may be used as auxiliary to the trade-mark proper, and may be of use in solving a question of intent of a party, in imitating, or using, an evasive simulation of another's trade-mark. As, for instance, a party may adopt a trade-mark, and imprint it upon or connect it with, the package of peculiar shape containing the article of his manufacture. Another party might make a colorable simulation of the trade-mark so used, but so different as to render it doubtful, upon a mere in-

5. **Imitation of Essential Feature.**—The purpose of an imitator of a trade-mark, as a general rule, is to sell his goods as and for those of the owner of the mark whose reputation is established, and for whose goods there is an existing demand, while at the same time dressing his goods and employing the trade-mark of his rival in such a manner as to avoid the charge of infringement and escape the punishment which his imitation deserves. In doing this he generally avoids the imitation of all the features of the package and goods of his rival, except the particular one by which the public took hold of the goods, such as a particular symbol by which the goods are known, or from which the name of the goods is derived, or some combination of words or letters which are considered by the public as the established guaranty of the owner's reputation and the identity of the goods. This essential feature of the mark or the method of putting the goods before the public is the thing upon which the infringer seizes, and by using it alone, hopes to escape the charge of infringement; but this essential feature is always the most important element of a trade-mark, and when proof is secured, or it is apparent from examination of the label or the goods that the essential feature has been taken, the defendant will be enjoined.¹

spection of the simulation of such mark alone, whether it was intended to be an imitation or not, or whether it would be likely to mislead the public. But, if the imitator should, in addition to this, use the peculiar shaped package adopted by the party entitled to the trade-mark, and impress upon, or connect with it, the simulation of the trade-mark, all doubt as to the intention and the effect would at once vanish. In this view, a peculiar package might be a valuable auxiliary to the trade-mark, although it could not, of itself alone, constitute a lawful trade-mark, or a substantive part of a lawful trade-mark."

In *Williams v. Spence*, 25 How. Pr. (N. Y. Supreme Ct.) 366, the term "Yankee," applied to soap, was not considered a valid trade-mark (*following Williams v. Johnson*, 2 Bosw. (N. Y.) 1); but the similarity between the labels, devices, and hand-bills of respective parties was sufficient to grant an injunction. Among other things, "the size and shape of the boxes, the almost literal adoption of the language used in the plaintiff's labels and hand-bills, overwhelms the small marks of difference which the defendants hoped would relieve them from the consequences of using the plaintiff's trade-mark."

Plaintiff, a manufacturer of metallic hones, sold them wrapped in envelopes, containing directions for use, etc. De-

fendant sold the same articles in similar envelopes with the same words. It was held that this was a fraud against the plaintiff and he was entitled to damages, although no special damage was proved. *Blofeld v. Payne*, 4 B. & Ad. 410.

1. A trade-mark on whisky barrels, consisting of the figure of a chicken cock within a circle surrounded by the words "Old Bourbon Whisky, Bourbon Co., Ky.," and the words "From J. A. Miller, Paris" (the whisky becoming known as "Miller's Chicken Cock Whisky," or "Chicken Cock Whisky"), is infringed by a trade-mark consisting of a similar picture and circle, the latter brand being called "Miller's Game Cock Rye," and the label bearing the words, "The King of all Whiskies. John Miller & Co., Sole Proprietors, Boston, Mass." *White v. Miller*, 50 Fed. Rep. 277.

Even where there is no technical trade-mark, as in the case of the word "American," used in connection with beer, yet protection will be granted against one who fraudulently uses the same word so as to palm off his goods as those of another. *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14. In this case, defendant closely imitated large muslin signs which plaintiff had hung at the various places where its beer was being

retailed, the most prominent feature of which was the word "American."

Pratt's Appeal, 117 Pa. St. 401, was a case of infringement of a peculiar stamp or print used on butter, and claimed as a trade-mark, the distinguishing feature of which was the representation of a cornucopia. The court, by Paxson, J., said: "If the defendant's print is an imitation of that of the plaintiffs . . . the motive of the defendant in adopting it is not material, so far as the law of the case is concerned." And it was further said that though the two devices, when placed side by side, present points of dissimilarity, and the distinctive name of each party appear upon the one he uses, yet if the distinguishing features of the two be the same, an injunction will be granted.

Plaintiff used on his bottles of bluing a bright metallic cap of tin, having six perforations. An injunction was granted to restrain defendants from using a similar cap in the same way on bottles of the same shape and appearance as those of plaintiff, although the labels used were entirely dissimilar. *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 389.

Plaintiffs and defendants bottled beer for export. Plaintiffs' label consisted of a bull-dog's head on a black ground, surrounded by a circular band in blue, on which were the words "Read Brothers, London, The Bull-Dog Bottling," in white letters. Defendants' label consisted of the head of a terrier on a black ground, surrounded by a red band on which were similarly printed the words, "Celebrated Terrier Bottling, E. Richardson." There was evidence that the beer of plaintiffs was known in the colonies as "Dog's-Head Beer," and it was alleged that the use of defendants' label enabled his beer to be also sold in the colonies as "Dog's-Head Beer." *Jessel, M. R.*, refused a preliminary injunction, which was granted on appeal. He said: "But I must be convinced of a great deal more than a want of anxiety on the part of the defendants to distinguish their beer from anybody else's beer (it being the mere label that is complained of); I must be satisfied that it is calculated to deceive, as it is said, or, in other words, that the use of it represents the goods of the defendants as the goods of the plaintiffs." *Brett, L. J.*, said: "But the plaintiffs' case is not founded merely upon the

alleged similarity of the labels. The plaintiffs found themselves upon the doctrine which has been laid down by Lord Cranworth and Lord Westbury, and especially upon the statement of Lord Cranworth, that if the goods of a manufacturer have, from the mark or device used, become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market is a violation of the rights of his rival." *Read v. Richardson*, 45 L. T. N. S. 54.

Plaintiffs, manufacturers and exporters to the markets in *India* of Turkey-red yarn, placed thereon a triangular-shaped ticket in green and gold, prominent among the devices of which were two elephants, supporting a banner with an inscription, and a crown between the elephants. Defendants began to export Turkey-red yarn and placed thereon a ticket, similar to that of plaintiffs, which had also two elephants supporting a banner, with an inscription, and the figure of the Hindoo goddess, Gunputty, between the elephants in the place of the crown. Plaintiff's ticket was proved to have been known in *India* by the name, among several others, of the "Bhe Hattie" or "Two Elephant" ticket. There was some evidence that defendant's goods were known as "Gunputty" or "Gunputty Hattie" yarn. There was no evidence of deception, but there was evidence that, although the merchants in Bombay might not be deceived, the ultimate purchasers would probably be. An injunction was granted to restrain defendants from the use of their ticket, or from using two elephants on any tickets on Turkey-red yarn not dyed by plaintiffs, without clearly distinguishing them from those of plaintiffs, or so as to represent that any of such yarn was dyed by the plaintiffs. *Orr v. Johnston*, 13 Ch. Div. 434; L. R., 7 App. Cas. 219. *Fry, J.*, said: "It appears to me, therefore, that I ought to hold that if one man will appropriate to himself a material and substantial part of the ticket which another man has used for the purpose of indicating his goods, he ought so to appropriate it, and with such precautions, as that the reasonable probability of error should be avoided." *Baggallay, L. J.*, said: "But it does not appear to me to be necessary for the plaintiffs to establish that such an intention [to imitate and copy plain-

tiff's trade-mark] existed. . . . Even if they acted through ignorance or inadvertance, they could not be allowed to continue to use a trade-mark of a character which would be calculated to lead to the deceit which I have already suggested." Lord Watson, in the House of Lords, said: "Apart from all questions as to *bona fides* or *mala fides* of the appellants, I am disposed to hold that the circumstances to which I have already adverted afford sufficient grounds for an injunction against the appellants. When a prominent and substantial part of a long and well-known trade-mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade mark belongs. The probability of that result is in this case enhanced by the circumstance that all Turkey-red yarns exported from this country are sold in packages which in size, shape, and color have the closest resemblance to each other. The reproduction of a prominent part of another merchant's trade-mark upon a new ticket does not *per se* establish that the latter was prepared by its owner with a view to deceive, by himself selling, or by enabling others to sell his goods as the manufacture of that other merchant. But no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader into whose hands his own goods may come, to sell them as the goods of his rival."

In *Hegeman v. O'Byrne*, 9 Daly (N. Y.) 264, Van Brunt, J., said: "As the labels are there shown, the most prominent feature upon both is the eagle with outstretched wings, perched upon a mortar, in which rests a pestle, and it is this device which would be the first to attract the attention of any purchaser." Judgment, which had dismissed the complaint in the court below, was reversed and a new trial awarded.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., *dissenting*, said: "When the entire trade-mark is copied, the case is free of difficulty, as the rule is universal that the infringer is liable; but the question is, when may it be said that a trade-mark has been taken by another? Answers to that question are found in several cases, of

which no one is more satisfactory than that given by the Master of the Rolls in a recent case. He says that a trade-mark to be taken need not be exactly copied, nor need it be copied with slight variations, but it must be a substantial portion of the trade-mark; to which he adds that it has sometimes been called the material portion, but that, as he states, means the same thing, and he then remarks that it means the essential portion of the trade-mark, and finally concludes the subject by saying that 'what the court has to satisfy itself of is that there has been an essential portion of the trade-mark used to designate goods of a similar description.' *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 443. . . . Complete imitation is not required by any of the well-considered cases. Instead of that, it is well settled that the proof of infringement is sufficient if it shows even a limited or partial imitation, provided the part taken is an essential portion of the symbol."

Plaintiff placed upon his cigarettes the symbol "13" in peculiar form, color, size, and style. Defendant used a similar symbol on other cigarettes, though the labels were entirely dissimilar. The court held that, although plaintiff was not entitled to the exclusive use of the symbol, since it indicated the presence in the cigarettes of two different kinds of tobacco and was not therefore sufficiently arbitrary, yet that he was entitled to the exclusive use of the symbol in the peculiar form in which he had used it, and granted an injunction accordingly. *Kinney v. Allen*, 1 Hughes (U. S.) 106.

Plaintiffs being, by agreement with the owners of the Apollinaris Spring in Germany, the sole importers into England of "Apollinaris Water," defendants sold a manufactured water as "London Apollinaris Water, possessing all the qualities of the natural water," but put up in a different way. An injunction was granted. *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

Plaintiffs were manufacturers for many years of "Glenfield Starch," doing business, first at Glenfield, afterwards at another place. Defendants began to manufacture starch at Glenfield, and sold it in packets on which the word "Glenfield" was prominent. It appears that Glenfield was neither a town, hamlet, nor village, nor had it a post office, but was a mere field in

which there were two or three manufacturers. It also appeared that several persons, asking at the shops for "Glenfield Starch," had been given that of the defendants. An injunction was granted by Vice Chancellor Malins, order discharged by Lord Justice James, and reversed on appeal to the House of Lords. *Wotherspoon v. Currie*, 22 L. T. N. S. 260; 18 W. R. 562, 942; 42 L. J. Ch. 130; 23 L. T. N. S. 443; L. R., 5 H. L. 508; 27 L. T. N. S. 393. Malins, V. C., said: "Now, one man may adopt or imitate the label or trade-mark of another with the most innocent intention possible, but the law is settled that if his imitation is such as is calculated to mislead purchasers into the belief that he is selling an article manufactured by that other, this court will interfere. . . . Whatever words or descriptions he used on his labels, he should not have used the one word which would prove injurious to the plaintiffs." Hatherley, L. C., said that where, according to the custom of the trade, as in the case of needles and starch, they were always put up in packages more or less similar, "it does become the more necessary to take care that the mark which is to distinguish the article shall be really distinguishing, and that when you have got all the other combinations so that persons do not look at the shape of the packet, or at any other indicia of the packet than the particular distinguishing mark (in this case the name of the man or the fancy name of the article), those things should, by people who wish to deal honestly by each other, be kept very distinct." Chelmsford, L. J., said: "Where the trade-mark is not actually copied, fraud is a necessary element in the consideration of every question of this description—that is, the party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark. For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as, not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs."

Westbury, L. J., said: "I have no doubt, therefore, that this case comes within the principle on which the jurisdiction is founded—the principle being to prevent a party from fraudulently availing himself of the trade-mark of another, which has already attained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colorable title to the use of the word, and provided it be shown from the manner in which he has employed those means that his object was, from the beginning, to invade the property of the appellants."

In *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275, the plaintiff owned a trade-mark for stoves, consisting of the words "Charter Oak," surrounded by a sprig of oak leaves. Defendant sold other stoves, using the same words as a mark, but without the sprig of leaves. Currier, J., said: "The only question raised on this branch of the case is whether the use of the name 'Charter Oak,' separated from the other parts of the plaintiff's mark, amounted to an infringement of his rights, assuming his ownership of the name as a trade-mark, in combination with the device of oak leaves. On this point there can be no reasonable doubt. The plaintiff's stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the name itself. That was the conspicuous element of the mark. By that name the stove was bought and sold, and known in the western and southern markets. It was the prominent, essential, and vital feature of the plaintiff's trade-mark. . . . The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated; nor is it necessary to show that anyone has in fact been deceived, or that the party complained of made the goods; nor is it necessary to prove intentional fraud. If the court see that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction."

Boardman v. Meriden Britannia Co., 35 Conn. 402; 95 Am. Dec. 270, was a case to restrain the fraudulent imitation of certain labels, etc., used by complainant in putting his spoons on the market. An injunction was granted.

